Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

RICHARD JEWELL,

Petitioner,

v.

COX ENTERPRISES, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Today's media era is an era of massive media coverage of all major events of public interest and concern. Almost all of these events involve private individuals. This case arises out of the media coverage of the bombing of Centennial Olympic Park during the 1996 Summer Olympics in Atlanta, Georgia. That event involved hundreds of private citizens, including the private security guard who first spotted the bomb and helped evacuate many people from the park. Ignoring established precedent of this Court, the Georgia Court of Appeals elevated the security guard from the status of private figure to limited-purpose public figure in a defamation action because his acts were heroic and because the media sought him out for interviews to discuss the bombing. In a holding so broad that all newsworthy individuals involved in events of public interest and concern are converted to limited-purpose public figures unless they reject any role in any public debate about the event, the Georgia Court of Appeals' opinion chills the free speech rights of private citizens, threatens the media's ability to obtain first-hand information from those citizens and spells the death of state defamation law.

The questions presented are:

(1) Whether the classification of an involuntary public figure in a defamation action exists beyond the hypothetical existence attributed to it in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

(2) Whether a private individual who is involuntarily involved in or associated with a matter that attracts public attention is converted into a voluntary limited-purpose public figure in a defamation action as a consequence of his participation in print and broadcast interviews requested by the media to obtain information about the newsworthy event.

LIST OF PARTIES BELOW

In addition to the parties reflected in the caption, defendants in the proceedings below include Kathy Scruggs (reporter and staff writer for the Atlanta Journal-Constitution), Ron Martz (reporter and staff writer for the Atlanta Journal-Constitution), Kent E. Walker (summer intern and staff writer for the Atlanta Journal-Constitution), Christy Oglesby (reporter and staff writer for the Atlanta Journal-Constitution), Maria Elena Fernandez (reporter and staff writer for the Atlanta Journal-Constitution), Christina Headrick (summer intern and staff writer for the Atlanta Journal-Constitution), Macon Morehouse (reporter and staff writer for the Atlanta Journal-Constitution), Dave Kindred (sports columnist for the Atlanta Journal-Constitution), John Walter (managing editor of the Atlanta Journal-Constitution), Rochelle Bozman (assistant editor for the Atlanta Journal-Constitution), Bert Roughton, Jr. (assistant editor for the Atlanta Journal-Constitution), Thomas Oliver (assistant editor for the Atlanta Journal-Constitution) and Ron Martin (editor of the Atlanta Journal-Constitution). On September 2, 2001, Kathy Scruggs died, and a motion to substitute Lewis Lanier Scruggs, Sr. as a party-defendant in his capacity as the duly appointed Administrator of the Estate of Kathy Scruggs is pending in the trial court.

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Petitioner Richard Jewell respectfully petitions for a writ of certiorari to review the October 10, 2001 opinion and judgment of the Court of Appeals of the State of Georgia in the above-captioned proceeding.

OPINIONS BELOW

The opinion and judgment of the Georgia Court of Appeals, *Jewell v. Cox Enterprises, Inc., et al.*, No. A01A1565 (Ga. Ct. App. Oct. 10, 2001), is reported at 251 Ga. App. 808, 555 S.E.2d 175 and is reprinted at App. 1a. The October 5, 1999 Order of the State Court of Fulton County, State of Georgia, is reported at 27 Media L. Rep. 2370 and is reprinted at App. 28a.

STATEMENT OF JURISDICTION

The judgment of the Georgia Court of Appeals was entered on October 10, 2001. The Georgia Supreme Court denied the petition for a writ of certiorari on February 11, 2002. (App. 42a). Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This Petition addresses questions concerning classifications of plaintiffs in defamation cases and their interaction with First Amendment freedoms of speech and of the press. The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend I.

STATEMENT OF THE CASE

This libel case arises from newspaper coverage by Respondents[1] of the July 27, 1996 bombing in Atlanta's Centennial Olympic Park and the subsequent investigation of Petitioner Richard Jewell in connection with the bombing. The blast killed one person and injured 110.

1. Before the bombing, Petitioner was an ordinary citizen who was unknown to the public. At the time of the bombing, Petitioner was working in the park during the Games of the XXVI Olympiad as a privately employed security guard. AT&T was the private corporation that hired private security for the park. Minutes before the explosion, in the routine performance of his job responsibilities, Petitioner spotted a suspicious and unattended package at the base of the five-story AT&T light and sound tower to which he was assigned to provide security. Petitioner immediately reported the existence of the package to law enforcement authorities pursuant to security protocol. At almost the same time as Petitioner reported the package to authorities, an anonymous 911 emergency call was received by police stating in effect that a bomb had been placed in the park and it would explode in thirty minutes. At a time when Petitioner believed the package contained a bomb, but did not know when it would explode, he assisted authorities in moving park patrons away from the direct vicinity of the package and then single-handedly evacuated many individuals from the AT&T tower.

2. In the first four days after the bombing, some members of the media described the security guard who found the bomb as a hero. News organizations contacted AT&T seeking interviews with the security guard who first spotted

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1. Respondents include the corporate owner of the Atlanta Journal-Constitution and certain editors and reporters of the newspaper who were involved in publishing the articles at issue.

the package that contained the bomb. A media relations coordinator employed by AT&T conveyed the media requests to Petitioner and helped with interview arrangements. During that four-day time period, at the request of the Boston Globe, CNN, USA Today, NBC, one local Atlanta television station and the Atlanta Journal-Constitution,[2] Petitioner agreed to participate in ten interviews to discuss the events surrounding the bombing. The interviews consisted of three newspaper interviews and seven television interviews. On the evening of July 27, Petitioner was interviewed by a CNN reporter and by a reporter from the Boston Globe. On July 28, Petitioner was interviewed by another CNN reporter, a reporter for USA Today, a summer intern employed by the Atlanta Journal-Constitution and, after being photographed at the park by the Atlanta Journal-Constitution, a local Atlanta television reporter who was conducting "man-on-the-street" interviews.[3] On July 29, Petitioner participated in a two-question telephone interview on CNN. On the morning of July 30, Petitioner was interviewed by Katie Couric on NBC's Today Show. Thereafter, an unknown NBC reporter and an unknown reporter interviewed Petitioner.[4] Petitioner did not

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2. Despite the fact the Atlanta Journal-Constitution was the newspaper striving to be at the forefront of the worldwide media coverage of the bombing and its aftermath, Petitioner was not mentioned by name in the newspaper on July 27, July 28 or July 29. The first mention of his name in Respondents' newspaper appeared on the morning of July 30, when he was discussed in a short article on page 29.

3. When he approached Petitioner for comment, the local television reporter did not know that Petitioner was the security guard who found the bomb. Immediately after that interview, Petitioner declined another attempt to be interviewed on camera because he had spotted some of his friends in the park and wanted to speak with them.

4. No evidence was submitted by Respondents to establish the substance of these two interviews or whether they were ever broadcast.

initiate, arrange or seek any of the interviews. Petitioner testified that he only gave the interviews to accommodate the desires of his employer and that he never intended to have any influence on any public controversy.

3. During the four-day time period in which Petitioner participated in less than a dozen interviews, he was just one of dozens, if not hundreds, of individuals being interviewed about the bombing and its aftermath. Petitioner's participation in the interviews occurred at a time when international print and broadcast coverage of the bombing was round-the-clock and dominated by interviews of Olympic officials, Olympic participants, government officials at all levels, law enforcement officials at all levels and eyewitnesses to the bombing and its aftermath.[5]

4. On the afternoon of July 30, on the front page of an extra edition of its newspaper, the Atlanta Journal-Constitution publicly identified Petitioner as a suspect in the park bombing with the above-the-fold, banner headline, "FBI suspects 'hero' guard may have planted bomb." In October of 1996, Petitioner was cleared of any involvement in the bombing by the United States Department of Justice. On January 28, 1997, Petitioner filed this action, alleging that Respondents libeled him in the July 30 afternoon article and in nineteen subsequent articles that contained false statements conveying to the reader, among other things, that Petitioner was an individual who was guilty or likely guilty of criminal involvement in the bombing, that Petitioner had a motive for bombing the park, and that Petitioner had an

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5. During the time period between July 27 and July 30, the Atlanta Journal-Constitution published 116 articles covering the bombing, mentioning 351 individuals by name. Out of the 116 articles and the 351 names, Petitioner's name was associated with only three articles and in two of those instances, his name was only used as a byline to a photograph of him.

aberrant personality and a bizarre history.[6] Petitioner does *not* base his libel case on the fact that the Atlanta Journal-Constitution identified him as a suspect or on the fact that it was the first member of the media to so identify him.

5. On February 26, 1999, Petitioner moved for partial summary judgment, asserting that under the definitive test enunciated by this Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) and its progeny, the trial court should find him to be a private defamation plaintiff.[7] Supported by his sworn testimony, the testimony of the AT&T media relations coordinator and the content of his interviews, Petitioner asserted that he was not an all-purpose public figure and was not a limited-purpose public figure because he had never thrust himself into the vortex of a public controversy in a purposeful attempt to influence the outcome of the

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6. The statements alleged by Petitioner to be libelous include, but are not limited to, false statements conveying that Petitioner was like Wayne Williams, who, as the 1982 convicted killer of the missing and murdered children of Atlanta, is known as the perpetrator of a series of the most heinous crimes in the history of this Nation; that Petitioner fit the FBI profile of the lone bomber of Olympic Park; that investigators believed Petitioner planted the bomb; that investigators believed that Petitioner placed the 911 warning call himself; that the bombing was a publicity stunt and Petitioner had a motive to bomb the park because he had sought publicity and press interviews for his actions; that Petitioner was a villain; that the bomber was a fool and Petitioner was a fool; that Petitioner was a bad man to cross on his beat; that Petitioner had a law enforcement reputation as a zealot; that Petitioner had a history of overzealous policing; and that Petitioner had been ordered by a judge to undergo mental health treatment.

7. In Georgia, private defamation plaintiffs must only prove negligent publication of a false and defamatory statement. *Triangle Publications, Inc. v. Chumley*, 253 Ga. 179, 180, 317 S.E.2d 534, 536 (1984). As of 1999, at least thirty-five states had adopted a negligence standard for private defamation plaintiffs. 1 Robert D. Sack, *Sack on Defamation* § 6.1 (3d ed. 1999).

controversy.[8] In opposing the motion, Respondents conceded that Petitioner was not an all-purpose public figure but contended that he was a limited-purpose public figure based on his prominent role in the events *surrounding the bombing* and the fact that he participated in less than a dozen media interviews despite being under no obligation to speak with the press.

6. Respondents failed to come forward with any evidence of the content of two of the ten interviews. In the remaining eight interviews, Petitioner's comments focused almost exclusively on recounting the events surrounding the bombing and his actions after he found the suspicious package. In a few of the interviews, Petitioner also responded to a handful of unsolicited questions posed by reporters about more general matters related to the bombing and, in doing so, Petitioner praised the professionalism of the emergency personnel who responded to the bombing, discussed his law enforcement training, spoke of training given to security personnel regarding suspicious packages, expressed his hope to work in law enforcement in Atlanta after the Olympics, credited other law enforcement personnel and emergency personnel with being the real heroes, and made one comment in one interview praising the members of the public who continued to attend Olympic events to show the bomber that this type of activity would not be tolerated in this world. In the interviews, Petitioner never commented on or advocated a position on the issue of whether the park or any other Olympic venue was safe from further attack.

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8. Petitioner submits that as a subsidiary issue fairly included within the questions presented, this case presents this Court with an opportunity to make clear that before a private individual is deprived of the protections of state law against defamation, the burden of proving public figure status by clear and convincing evidence rests with the party asserting that status as a defense.

7. On October 5, 1999, relying almost exclusively on language from the decisions in *Silvester v. American Broadcasting Cos.*, 839 F.2d 1491 (11th Cir. 1988) and *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980), the trial court denied Petitioner's motion and held that Petitioner was a voluntary limited-purpose public figure for purposes of the public controversy over "Olympic Park safety." (App. 40a). The trial court's order also suggested that Petitioner was an "involuntary limited purpose figure." (App. 41a).

The trial court's opinion made clear that Petitioner lost his private figure status because his role in the bombing events made him "almost necessarily . . . someone who was newsworthy" (App. 39a), and because he exercised his First Amendment right to speak about his knowledge of a matter of public interest: "[a] different question would be presented if [Petitioner] had refused comment or spoken only as to the events witnessed" (App. 40a), and "even if [Petitioner's] entry into the controversy was involuntary, 'unless he rejects any role in the debate, he too has invited comment relating to the issues at hand.'" (App. 41a).

8. On November 16, 1999, Petitioner's application for interlocutory appeal of the trial court's order was granted by the Georgia Court of Appeals. Thereafter, in an opinion that was a virtual mirror image of the trial court's order in its reasoning, language and reliance on *Silvester* and *Waldbaum*, the Georgia Court of Appeals affirmed the trial court and held that Petitioner was a voluntary limited-purpose public figure for purposes of the public controversy over Olympic Park safety. Going beyond the trial court's order, the Georgia Court of Appeals relied upon the decision in *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736 (D.C. Cir. 1985) to further hold that in the event the trial court erred in finding that Petitioner was a voluntary limited-purpose public figure, the evidence was "clear and convincing" that Petitioner was an "involuntary limited-purpose public figure." (App. 22a).

In an opinion remarkable for its lack of any meaningful discussion of the public figure analysis of the *Gertz* decision and its failure to even mention, much less discuss, this Court's post-*Gertz* public figure decisions in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) and *Wolston v. Reader's Digest Ass'n., Inc.*, 443 U.S. 157 (1979), the Georgia Court of Appeals concluded that Petitioner lost his private individual status because he was "a prominent figure in the coverage of the controversy," he did not "reject any role in the public controversy debate," and he agreed "voluntarily" to participate in the media interviews. The decision made it clear that it was Petitioner's "public discussion of the bombing" that rendered him a public figure, including his first-hand factual statements to the media:

> [Petitioner] stated that he had spotted the bag after a group of rowdy, college-aged men had left the park. And he announced on CNN that he had matched one of the men to a composite sketch. These statements gave the impression that police had solid leads and the park was safe.

(App. 19a).

Thus, the decision of the Georgia Court of Appeals establishes the legal principle that factual eyewitnesses to a newsworthy event are converted into voluntary limited-purpose public figures if they agree to media interviews to discuss the facts of the event since eyewitness factual statements always influence to some extent the listener and reader.

In concluding that Petitioner was also, under the same set of facts, an "involuntary limited-purpose public figure," the Georgia Court of Appeals found that Petitioner achieved public figure status because he became involved in a public controversy and affair without his consent or will as the result

of the fact that he "had the misfortune to have a tragedy occur on his watch." (App. 23a). The decision found that Petitioner "played a central, albeit possibly involuntary, role in the controversy" over park safety because:

> [Petitioner] happened to be the security guard on duty at the time of the bombing, happened to be the security guard who found the bomb, and happened to be involved in the evacuation of the public from the area where the bomb was located.

(App. 24a).

Although its opinion quoted from the *Gertz* decision, the Georgia Court of Appeals used ellipses in the opinion to omit the following language, "[h]ypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare." (App. 15a).

9. On February 12, 2002, the Georgia Supreme Court denied Petitioner's request for discretionary review of the opinion and judgment of the Georgia Court of Appeals.

10. This Petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

The Petition should be granted because the Georgia Court of Appeals' decision conflicts with holdings of this Court in two important ways. *First*, the decision recognizes the classification of an involuntary limited-purpose public figure under which a private individual is converted into a public figure if that person happens to be a central, albeit involuntary, figure in a newsworthy event. That holding is contrary to this Court's decisions in *Gertz* and its progeny that recognize only two classifications of public figures, all-

purpose and voluntary limited-purpose, and that do not permit public figure status to result from mere newsworthiness. As a practical matter, the Georgia Court of Appeals' recognition of an involuntary limited-purpose public figure classification reinstates the public or general concern doctrine of *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971), a doctrine this Court rejected in *Gertz* and has continued to reject in its post-*Gertz* decisions.

Second, the Georgia Court of Appeals' decision establishes the legal principle that a private individual who agrees to media requests for interviews as an on-the-record source for first-hand information about a newsworthy event is converted into a voluntary limited-purpose public figure because he voluntarily assumes a position of influence in a public controversy as a result of his participation in the interviews. That holding is contrary to this Court's decisions in *Gertz* and its progeny that prohibit a media defendant charged with defamation from converting, by its own conduct, a private claimant into a public figure and that restrict limited-purpose public figure status to individuals who voluntarily act with an intent to influence or advocate a particular outcome to a public controversy. The Georgia Court of Appeals' holding is speech-restricting: it chills a private individual's exercise of the First Amendment right of free speech and thereby diminishes the ability of the media to inform the public about a newsworthy event. In the absence of clear and convincing evidence of an intent to advocate a particular outcome, voluntary participation in interviews to satisfy inquiring reporters should never serve as a basis for converting a private individual into a public figure.

It has been over twenty years since this Court addressed the constitutional classifications of public and private figures in defamation cases. The media era of the 21st Century is an era of almost unlimited, non-stop, massive media coverage of major events of public interest and concern that involve

private individuals. Review of this case should be granted in order for this Court to decisively foreclose future litigation over the viability of the involuntary public figure classification. Review of this case should be granted in order for this Court to protect the rights of private individuals who agree to media requests to serve as on-the-record sources of first-hand information about newsworthy events. Allowing the Georgia Court of Appeals' broad, open-ended approach to public figure status to stand as authority to be followed by other state and federal courts will spell the death of state defamation laws in cases against media defendants.

I. The Decision Below Conflicts With Decisions Of This Court That Have Refused To Recognize The Existence Of The Category Of An Involuntary Public Figure.

As acknowledged by the Georgia Court of Appeals, Petitioner was a private individual prior to the park bombing. In addition to holding that Petitioner was converted into a voluntary limited-purpose public figure because he agreed voluntarily to media requests for interviews to discuss his first-hand knowledge of the park bombing, the Georgia Court of Appeals held that under the same facts, Petitioner was also an involuntary limited-purpose public figure. This case presents this Court with the opportunity to clarify for once and for all whether the classification of an involuntary limited-purpose public figure exists as a matter of constitutional defamation law.[9]

In *Gertz*, this Court explicitly recognized only two classifications of public figures: all-purpose and voluntary limited-purpose. *Gertz* did not explicitly recognize the

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9. *See* Nat Stern, *Unresolved Antithesis of the Limited Purpose Public Figure Doctrine*, 33 Hous. L. Rev. 1027, 1102 (1996) ("[T]he very existence of involuntary public figures stands in a kind of limbo; in an appropriate case, the Court should rule either that Gertz meant what is said, or that the Court's post-Gertz trilogy tacitly revoked that category of public figures.").

classification of an involuntary public figure. In writing for the majority, Justice Powell posited, in dictum, the possibility of such a third category, stating "[h]ypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare." *Gertz*, 418 U.S. at 345. The question of the existence of this category beyond the hypothetical appears to have been answered in the negative by the fact that this Court's post-*Gertz* decisions in *Firestone*, *Hutchinson* and *Wolston* make no reference to the category of an involuntary public figure. Indeed, *Wolston* specifically makes reference to only "two ways in which a person may become a public figure for purposes of the First Amendment:" — the all-purpose and voluntary limited-purpose designations.[10] *Wolston*, 443 U.S. at 164.

Wolston also made clear that the fact that an individual is newsworthy because of involvement or association with a matter that attracts public attention is not sufficient to transform a private individual into a public figure:

> Petitioner's [actions] no doubt were 'newsworthy,' but the simple fact that these events attracted media attention also is not conclusive of the public- figure issue. A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts

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10. Prior to the decision in the instant case, no published Georgia case had ever recognized or mentioned the existence of the category of an involuntary public figure. In fact, consistent with *Wolston*, the decisions in *Byers v. Southeastern Newspaper Corp., Inc.*, 161 Ga. App. 717, 719, 288 S.E.2d 698, 700 (1982) and *Hemenway v. Blanchard*, 163 Ga. App. 668, 670, 294 S.E.2d 603, 605 (1982) recognized only two classifications of public figures, all-purpose and voluntary limited-purpose. The decision below failed to make any mention of the *Byers* and *Hemenway* decisions.

> public attention. To accept such reasoning would in effect re-establish the doctrine advanced by the plurality opinion in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), which concluded that the *New York Times* standard should extend to defamatory falsehoods relating to private persons if the statements involved matters of public or general concern. We repudiated this proposition in *Gertz* and in *Firestone*, however, and we reject it again today. A libel defendant must show more than mere newsworthiness to justify application of the demanding burden of *New York Times*. See *Time, Inc. v. Firestone*, 424 U.S., at 454, 96 S.Ct., at 965.

Wolston, 443 U.S. at 167-68.[11]

As previously noted, in finding that the classification of an involuntary limited-purpose public figure is a viable category for a plaintiff in a defamation action, the Georgia Court of Appeals ignored the *Gertz* dictum that instances of a "hypothetical" involuntary public figure must be "exceedingly rare." The lower court decision also failed to mention the post-*Gertz* decisions in *Firestone*, *Hutchinson* and *Wolston* and did not discuss the impact of those decisions

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11. A number of lower federal court decisions have also concluded that an involuntary public figure classification does not exist. *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1115 (N.D. Cal. 1984); *Franklin v. Benovolent & Protective Order of Elks*, 97 Cal. App. 3d 915, 930 (1979); *Schultz v. Readers Digest Ass'n.*, 468 F. Supp. 551, 559 (E.D. Mich. 1979) (*Firestone* "forecloses the possibility" of the involuntary limited-purpose public figure status). Similarly, some of our Nation's highest state courts have indirectly rejected the involuntary public figure classification. *E.g.*, *Jones v. Palmer Comm's, Inc.*, 440 N.W.2d 884, 895 n.1 (Iowa 1989); *Burgess v. Reformer Pub. Corp.*, 508 A.2d 1359, 1361 n.4 (Vt. 1986).

on the issue of the existence of the involuntary public figure category.[12]

While ignoring this Court as well as other authorities and commentators who have addressed the involuntary public figure classification,[13] the Georgia Court of Appeals fully embraced the "sheer bad luck doctrine" enunciated in *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736 (D.C. Cir. 1985). The Georgia Court of Appeals described Petitioner as an involuntary public figure because he was a person "who had the misfortune to have a tragedy occur on his watch"

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12. This failure has been described as "not only lazy, but inexcusable when First Amendment rights were at stake." Clay Calvert & Robert D. Richards, *A Pyrrhic Press Victory: Why Holding Richard Jewell is a Public Figure is Wrong and Harms Journalism*, 22 Loy. L.A. Ent. L. Rev. 293, 322 (2002).

13. As one commentator has noted, the "case law and majoritarian view of the commentators correctly view this category as 'not merely 'exceedingly rare' but extinct.'" David A. Elder, *Defamation: A Lawyer's Guide* § 5:8 at 57 (1993). *See also* Gerald G. Ashdown, *Gertz and Firestone: A Study in Constitutional Policy-Making*, 61 Minn. L. Rev. 645, 681 n.175 (1977) (observing that this Court has "eliminated the possibility that a person may become an involuntary public figure"); Mark L. Rosen, *Media Lament — The Rise and Fall of Involuntary Public Figures*, 54 St. John's L. Rev. 487, 502 (1980) (stating that the involuntary public figure classification is "all but extinct"); David L. Wallis, *The Revival of Involuntary Limited-Purpose Public Figures — Dameron v. Washington Magazine, Inc.*, 1987 B.Y.U. L. Rev. 313, 319 (describing *Wolston* as "further evidence of the demise of the involuntary public figure category"); Mark T. Karinja, Comment, *Defamation: Conflict in the Definition of "Public Figure,"* 10 Seton Hall L. Rev. 822, 846 (1980) (observing this Court's "reject[ion] sub silentio" of the involuntary public figure classification); Dale K. Nichols, Note, *The Involuntary Public Figure Class of Gertz v. Robert Welch: Dead or Merely Dormant?*, 14 U. Mich. J.L. Reform 71, 84 (1980) (suggesting that this Court's trilogy of *Firestone*, *Hutchinson*, and *Wolston* have dealt a "death blow" to the involuntary public figure classification).

(App. 23a) and as a result, became "involved in public controversies and affairs without [his] consent or will." (App. 23a). The *Dameron* decision has been recognized as little more than a reformulation of the rejected *Rosenbloom* public or general concern doctrine. *See Wells v. Liddy*, 186 F.3d 505, 539 (4th Cir. 1999) ("The *Dameron* definition of an involuntary public figure, someone who by bad luck is an important figure in a public controversy, runs the risk of returning us to the *Rosenbloom* plurality's conception of defamation law.");[14] David L. Wallis, Note, *The Revival of Involuntary Limited-Purpose Public Figures - Dameron* v. *Washington Magazine, Inc.*, 1987 B.Y.U. L. Rev. 313 (1987) (criticizing the *Dameron* approach as over-inclusive and as a return to *Rosenbloom*). This Court has made it abundantly clear that it is unwilling to reinstate the public or general concern test of *Rosenbloom* as it represents an extension of the *New York Times* test that abridges the legitimate state interest in enforcing a legal remedy for defamatory falsehood injurious to the reputation of a private individual to a degree this Court finds unacceptable. *See Firestone*, 424 U.S. at 454; *Wolston*, 443 U.S. at 167-68.

The Georgia Court of Appeals' standard is arguably broader than the *Dameron* standard, as the opinion did not stop with approval of the sheer bad luck doctrine, but went further to set forth a definition of the involuntary public figure category in the broadest of terms: "the happen to be" test. To this end, the Georgia Court of Appeals held that there was "clear and convincing evidence" that Petitioner was an involuntary limited-purpose public figure because he

14. As the *Wells* decision aptly explains, even if this Court decides to recognize the involuntary public figure category, the *Dameron* "sheer bad luck" standard must be rejected because, as *Gertz* tells us, "involuntary public figures 'must be exceedingly rare,' and, unfortunately, bad luck is relatively common." *Wells*, 186 F.3d at 539. The *Dameron* test for an involuntary limited-purpose public figure would render that category "exceedingly common."

"*happened to be* the security guard on duty at the time of the bombing, *happened to be* the security guard who found the bomb, and *happened to be* involved in the evacuation of the public from the area where the bomb was located." (App. 24a) (emphasis added). This language makes clear that, contrary to this Court's decisions, the opinion below converts all private individuals into involuntary public figures if they happen to be involved in an event of public interest and concern and their involvement happens to make them newsworthy.[15]

Here, the Georgia Court of Appeals converted Petitioner into an involuntary public figure based solely on the fact that Petitioner fulfilled his job responsibilities as a private security guard in the course of being involuntarily involved in a tragic event that captured the attention of the world. In branding Petitioner an involuntary public figure, the Georgia Court of Appeals held that Petitioner lost valuable state protections against defamation and found his reputation at greater risk of defamatory attack as the result of simply doing his job at the time of the bombing. In short, that portion of the Georgia Court of Appeals' decision that holds Petitioner to be an involuntary public figure penalizes Petitioner for doing his job and, in the process, saving many innocent lives. The Georgia Court of Appeals holding conflicts with this Court's decision in *Wolston* that requires a finding that fulfilling his job responsibilities in connection with a newsworthy event provides "no basis whatsoever for concluding that petitioner relinquished to any degree, his interest in the protection of his own name." *Wolston*, 443 U.S. at 168.

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15. Under the Georgia Court of Appeals' test, all private individuals who *happened to be* involved in or associated with the tragic circumstances of the September 11 terrorists' attacks would be involuntary public figures.

The fact that the Georgia Court of Appeals has now joined the ranks of lower courts that have recognized the existence of an involuntary public figure classification beyond the hypothetical underscores the necessity for this Court to now end the debate among lower state and federal courts about the category's existence and its definition by unequivocally rejecting the existence and viability of the category.[16] Unless this Court is prepared to expand the categories of public figures and reverse its heretofore restrictive approach to converting private individuals into public figures, the Petitioner's role in the bombing events and the prominence of that role are insufficient to convert him into a public figure. Whether Petitioner was converted into a voluntary limited-purpose figure by his subsequent

16. The federal appellate courts are clearly in conflict over the question of whether the classification of an involuntary public figure exists beyond the mere hypothetical. Since *Gertz*, it appears that seven circuits have either failed to expressly recognize or have implicitly rejected the classification. *Pendleton v. City of Haverhill*, 156 F.3d 57 (1st Cir. 1998); *Yiamouyiannis v. Consumers Union of U.S., Inc.*, 619 F.2d 932 (2d Cir.), *cert. denied*, 449 U.S. 839 (1980); *Bichler v. Union Bank & Trust Co.*, 715 F.2d 1059 (6th Cir. 1983), *vacated*, 718 F.2d 802 (1983), *on rehearing*, 745 F.2d 1006 (1984); *Littlefield v. Ft. Dodge Messenger*, 614 F.2d 581 (8th Cir. 1980), *cert. denied*, 445 U.S. 945 (1980); *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188 (6th Cir 1989), *cert. denied*, 493 U.S. 812 (1989); *Garcia v. Board of Educ. of Socorro Consol. School Dist.*, 777 F.2d 1403 (10th Cir. 1985), *cert. denied*, 479 U.S. 814 (1986); *Silvester v. American Broadcasting, Co.*, 839 F.2d 1491 (11th Cir. 1988). The remaining circuits that do recognize the classification have developed a variety of conflicting theories and factors for determining the constitutional parameters of the category. *Compare Dameron* (defining an involuntary public figure as one who by bad luck is an important figure in a public controversy *and Wells* (creating a six-part involuntary public figure test focusing on whether the claimant was "a central figure during debate over that matter") *with Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976) (stating "that the wife of a public figure . . . more or less automatically becomes at least a part-time public figure herself").

decision to agree to media requests for interviews to discuss that role is the only proper inquiry in this case.

II. The Decision Below Conflicts With Decisions Of This Court That Prohibit Those Charged With Defamation From Converting, By Their Own Conduct, A Private Claimant Into A Public Figure.

In *Hutchinson*, this Court held that "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Hutchinson*, 443 U.S. at 135.[17] The Georgia Court of Appeals' decision directly conflicts with that holding by allowing the media, by its conduct, to convert a private individual into an on-the-record source and then use that role to convert him into a voluntary limited-purpose public figure.

In reaching its determination that Petitioner was a voluntary limited-purpose public figure, the Georgia Court of Appeals relied upon: (1) the media's coverage of Petitioner's role in discovering the bomb and evacuating park patrons, noting that he had been described as a "media hero"; (2) the number of media interviews granted by Petitioner at the media's request; (3) Petitioner's responses to the questions posed by the media in the interviews; and (4) the extent of the coverage that the media gave to his comments in the interviews. All of these factors are derived from, or determined by, the media's conduct, including that of Respondents' newspaper.[18] The only conduct of Petitioner

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17. *Accord Wolston*, 443 U.S. at 167-68.

18. The Atlanta Journal-Constitution article about Petitioner was published on the morning of July 30 along with photographs of Petitioner taken at the July 28 photo shoot. The newspaper knew that Petitioner was under FBI investigation prior to the time it published its article and photographs on the morning of July 30. In fact, at that time, the newspaper was itself actively engaged in investigating Petitioner.

emphasized by the Georgia Court of Appeals was that he "voluntarily made media appearances" when he was "under no obligation to do any interviews." (App. 20a). Thus, the decision below found that Petitioner relinquished his interest in the protection of his name by agreeing to media requests to be an on-the-record source for first-hand information about the bombing. Under the holding of the Georgia Court of Appeals, the only way that Petitioner could avoid being converted into a voluntary limited-purpose public figure would have been to "reject any role in the public controversy."[19] (App. 21a).

That portion of the Georgia Court of Appeals' decision that holds Petitioner to be a voluntary limited-purpose public figure *penalizes* Petitioner for exercising his First Amendment right of free speech to discuss the bombing while *protecting* Respondents from liability for defamation by allowing them to create their own defense based on Petitioner's agreement to serve as an on-the-record source to assist the media in its discussion of the bombing. The decision of the Georgia Court of Appeals permits the media to solicit a private individual to serve as an on-the-record source for first-hand information about an event of public concern and then turn around and use that person's agreement to cooperate against him.[20] The decision below

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19. Herein lies the ultimate "Catch-22" for Petitioner: if he had rejected any role in the debate and refused the media requests for interviews, not only would the public be deprived of first-hand information about the event, but when his name surfaced as a suspect, his refusal to grant media interviews would undoubtedly have been used against him as being suspicious or indicating he had something to hide.

20. The opinion below, on the issues relating to disclosure by Respondents of their confidential sources (issues not before this Court in this Petition), demonstrates that Respondents have gone to extraordinary lengths to protect their "confidential sources" while aggressively seeking to penalize Petitioner for agreeing to be one of their "on-the-record" sources.

diminishes, rather than enhances, the purposes of the First Amendment as it chills the speech of untold numbers of private individuals involved in or associated with newsworthy events. By chilling a private individual's right of free speech, the decision below also threatens journalists' ability to obtain on-the-record sources of information.[21]

Historically, since *New York Times*, "this Court has sought to define the accommodation required to assure the vigorous debate on public issues that the First Amendment was designed to protect while at the same time affording protection to the reputation of individuals." *Hutchinson*, 443 U.S. at 133-34. Here, the interests to be accommodated exceed the historical, as they also include Petitioner's First Amendment right to disseminate information by agreeing to media requests that he serve as an on-the-record source.[22] Participation in the debate over a public controversy by private individuals such as Petitioner who provide first-hand information about the controversy is essential to insuring not only a vigorous debate, but also an informed debate.

The record establishes that Petitioner participated in less than a dozen media interviews in response to inquiries from reporters requesting his eyewitness account of the park

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21. Two distinguished First Amendment commentators have recently analyzed the Richard Jewell case and urge this Court to grant review in this case and adopt a "Good Samaritan Source" rule shielding private individuals from public figure status "when they do no more than comply with media requests for comments and answer media-posed questions on issues of public concern." Clay Calvert & Robert D. Richards, *A Pyrrhic Press Victory: Why Holding Richard Jewell is a Public Figure is Wrong and Harms Journalism*, 22 Loy. L.A. Ent. L. Rev. 293, 325-26 (2002).

22. As hereinafter discussed, Petitioner does not contend that a private individual who participates in media interviews with an intent to influence or advocate a particular outcome to a public controversy should be immune from public figure status.

bombing and his role in discovering the bomb and assisting in the evacuation of the park. These interviews occurred at a time when the overriding question in the mind of the public was: what happened? Certainly, any public debate over park safety would be rendered meaningless if Petitioner, and the other hundreds of individuals interviewed, had rejected the role of providing information to the public through interviews requested by the media. The public's need to know and the media's right to inform the public about a newsworthy event such as the bombing of Centennial Olympic Park require more than merely reporting the public statements of public officials and law enforcement officials. In order for the public to be fully informed about such events and for the media to completely report on such events, there must be dissemination of information from private citizens who were eyewitnesses or participants.[23]

Any legal doctrine or principle that has a chilling effect upon on-the-record news sources is speech-restricting and should be viewed with disfavor by this Court, particularly when state laws are adequate to fairly protect the media in any defamation claim brought by one of its sources. This Court should encourage private individuals to serve in the role of being on-the-record sources to provide newsworthy information to the public — this Court should never discourage

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23. For a recent example of the public's need to be informed by private individuals who happen to be involved in a matter that attracts public attention, this Court need look no further into the past than to the media coverage of the tragic events of September 11 and their aftermath. Unquestionably, the public debate over those tragic events was facilitated by information obtained from the interviews of hundreds, if not thousands, of private individuals who were eyewitnesses, participants, victims or the friends and family of victims. From those interviews, among other things, the public was informed about what happened; about the response of law enforcement and emergency personnel to the events and their professionalism and training; and about the reaction to the tragedy. It is this exact type of first-hand information about the park bombing that Petitioner provided to the public in response to questions posed by the reporters in media interviews.

such service by sanctioning a decision that demands that a private individual reject any role in the public debate in order to avoid public figure status. Review of the Georgia Court of Appeals' decision is necessary in order for this Court to soundly reject a legal principle that penalizes private individuals who agree to serve as on-the-record news sources by permitting the media to successfully assert that such role converted them to public figure status.

III. The Decision Below Conflicts With Decisions Of This Court That Restrict The Classification Of Voluntary Limited-Purpose Public Figure To Individuals Who Voluntarily Thrust Themselves Into A Public Controversy With An Intent To Influence Or Advocate A Particular View.

As stated, Petitioner urges this Court to reject any definition of a public figure category that chills the speech of on-the-record news sources by penalizing the sources for agreeing to provide first-hand information essential to an informed public debate. In adopting such a definition, the Georgia Court of Appeals' decision conflicts with the decisions of this Court in *Gertz*, *Firestone*, *Hutchinson* and *Wolston* that protect a private individual who agrees voluntarily to media interviews by allowing him to maintain the status of a private defamation plaintiff unless the individual agrees to participate in the interviews in an attempt to influence or advocate a particular outcome to a public controversy. The definitive test to determine whether a private individual has been converted into a voluntary limited-purpose public figure was initially set forth in *Gertz*:

> More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.

Gertz, 418 U.S. at 345.

In the three post-*Gertz* decisions of *Firestone*, *Hutchinson* and *Wolston*, this Court has consistently adhered to a restrictive approach to voluntary limited-purpose public figure status, reversing the lower courts and holding that the plaintiffs were private individuals rather than limited-purpose public figures.[24] As it failed to do in its discussion of the category of an involuntary public figure, the Georgia Court of Appeals made no attempt to discuss or distinguish the holdings and language of *Firestone*, *Hutchinson* or *Wolston* in reaching its conclusion that Petitioner was a voluntary limited-purpose public figure.[25]

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24. *See generally* Rodney A. Smolla, *Law of Defamation* § 2.08, at 2-23 (1993) ("In the aftermath of *Gertz*, the Supreme Court undertook a series of refinements to the 'limited' public figure, consistently giving the term an application more restricted in scope than the simple word 'public' might suggest as a matter of popular colloquial usage.").

25. In an omission that defies reasonable judicial explanation, the Georgia Court of Appeals also did not cite or attempt to distinguish its decision in *Hemenway v. Blanchard*, 163 Ga. App. 668, 294 S.E.2d 603 (1982), its own controlling authority on the category of a voluntary limited-purpose public figure. Consistent with *Gertz* and its progeny, the *Hemenway* decision requires the court to focus on intent to influence. All Georgia precedent since *Hemenway* has been consistent with *Hemenway*'s focus on intent to influence the particular controversy as the controlling test. *See Woy v. Turner*, 573 F. Supp. 35, 38 (N.D. Ga. 1983) (a sports agent used the media on a "regular basis in an attempt to influence the outcome of the contractual dispute"); *Finkelstein v. Albany Herald Pub. Co.*, 195 Ga. App. 95, 97, 392 S.E.2d 559, 561 (1990) (an attorney "had voluntarily and deliberately thrust himself into the forefront of the controversy" respecting the district attorney's office, *admitting* that he made an appearance on a television program for the purpose of discussing problems in the district attorney's office); *Shannon v. Rado*, 200 Ga. App. 495, 496, 408 S.E.2d 441, 443 (1991) (plaintiff's "nationwide consumer advocacy" campaign "clearly sought publicity in an attempt to influence the outcome of the controversy").

Significantly, in *Firestone*, this Court stated that holding press conferences to satisfy inquiring reporters does not *per se* convert one into a public figure in the absence of an intent to influence the resolution of a public controversy — an intent which this Court also noted could not be assumed from the mere fact that the individual participated in the press conferences:

> [W]e [do not] think the fact that respondent may have held a few press conferences during the divorce proceedings in an attempt to satisfy inquiring reporters converts her into a 'public figure.' Such interviews should have had no effect upon the merits of the legal dispute between respondent and her husband or the outcome of the trial, and we do not think it can be assumed that any such purpose was intended. Moreover, there is no indication that she sought to use the press conferences as a vehicle by which to thrust herself to the forefront of some unrelated controversy in order to influence its resolution.

Firestone, 424 U.S. at 454-55 n.3 (citing *Gertz*, 418 U.S. at 323).

This Court's subsequent decision in *Wolston* made it abundantly clear that the intent to influence test of *Gertz* is the equivalent of a definition that states that a private individual does not become a public figure unless he voluntarily engages the public's attention with an intent to advocate a particular view. Justice Blackmun fully understood the restrictive limited-purpose public figure test upheld by the majority in *Wolston* when he described it in his concurring opinion:

> I agree that petitioner is not a 'public figure' for purposes of this case. The Court reaches this conclusion by reasoning that a prospective public

> figure must enter a controversy 'in an attempt to influence the resolution of the issues involved,' . . . and that petitioner failed to act in that manner purposefully here. The Court seems to hold, in other words, that a person becomes a limited-issue public figure only if he literally or figuratively 'mounts a rostrum' to advocate a particular view. I see no need to adopt so restrictive a definition of 'public figure' . . .

Wolston, 443 U.S. at 169-70 (Blackmun, J., concurring).

Contrary to this Court's restrictive definition, the Georgia Court of Appeals held that the fact that Petitioner "voluntarily made media appearances" when he was "under no obligation to do any interviews" was sufficient to convert him into a voluntary limited-purpose public figure. (App. 20a). Relying almost exclusively on selective language from the Eleventh Circuit's decision in *Silvester* and the D.C. Circuit's decision in *Waldbaum*, the Georgia Court of Appeals adopted an open-ended test for the category of voluntary limited-purpose figure, stating: "It is sufficient . . . that [Jewell] voluntarily engaged in a course that was bound to invite attention and comment." (App. 21a). The only voluntary course taken by Petitioner was his agreement to be interviewed as an on-the-record source of information for the media.

In *Wolston*, this Court repudiated a "course of conduct" approach to public figure status and an exact holding by the D.C. Court of Appeals ("by refusing to comply with the subpoena, petitioner 'stepped center front into the spotlight focused on the investigation of Soviet espionage.' In short, by his voluntary action he invited attention and comment in connection with the public questions")[26] was rejected and reversed in *Wolston* ("We do not agree with . . . the lower

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26. *Wolston*, 443 U.S. at 165 (quoting *Wolston v. Reader's Digest Ass'n., Inc.*, 578 F.2d 427, 431 (D.C. Cir. 1978)).

courts that petitioner can be classed as such a limited-purpose public figure").[27]

In its open-ended analysis, the Georgia Court of Appeals focused on "the extensive media coverage [Petitioner] received as the individual who discovered the bomb and helped evacuate the public" (App. 18a), the number of interviews Petitioner granted and the extent of the media coverage of his comments. The Georgia Court of Appeals concluded that these factors would reveal to an objective, reasonable person that Petitioner "*would play* or was seeking to play a major role in determining the outcome of the controversy" over park safety. (App. 20a) (emphasis added).

The Georgia Court of Appeals' open-ended definition[28] of a voluntary limited-purpose public figure improperly de-emphasizes the intent of the individual and focuses instead on how much coverage the media gave the individual and the impact of that media-generated publicity. The test adopted by the Georgia Court of Appeals conflicts with this Court's test by making it irrelevant whether Petitioner engaged in the voluntary conduct with the intent to advocate a particular outcome to a public controversy. The Georgia Court of Appeals' open-ended definition converts Petitioner into a

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27. *Wolston*, 443 U.S. at 166.

28. An excellent example of how the results as to public figure status are quite different under an open-ended approach and this Court's *Gertz* and post-*Gertz* restrictive approach is found in two cases involving the same plaintiff with different results. *Compare Foretich v. Advance Magazine Publishers*, 765 F. Supp. 1099, 1107-08 (D.D.C. 1991) (finding *Waldbaum* criteria dictated public figure status on the ground that plaintiff was a "central figure" in a public dispute and her defensive response to the controversy was "a course of conduct that was likely to attract substantial attention") *with Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1554 (4th Cir. 1994) (finding the defendant did not meet its burden of proving public figure status under the "relatively stringent" test used by that circuit).

public figure if any of his comments or the coverage of his comments could reasonably be expected to influence the public, including comments conveying first-hand factual information:

> [Petitioner] stated that he had spotted the bag after a group of rowdy, college-aged men had left the park. And he announced on CNN that he had matched one of the men to a composite sketch. These statements gave the impression that police had solid leads and the park was safe.

(App. 19a).

Under the Georgia Court of Appeals' definition of a voluntary limited-purpose public figure, there is no distinction between speech intended to inform and speech intended to advocate. All speech, including eyewitness factual statements, makes an impression on the listener or reader. Thus, all speech, including eyewitness factual statements, can be interpreted as being influential. Under the Georgia Court of Appeals' open-ended definition, from the moment Petitioner spotted the package and helped evacuate park patrons from the vicinity of the blast, he was doomed to voluntary public figure status if he made any comments whatsoever about the events. It is difficult to envision a more speech-restricting legal principle or one more offensive to an individual's First Amendment right of free speech.

Under the restrictive approach followed by this Court, it is clear that Petitioner did not lose his private figure status — he never sought to influence or advocate a particular outcome to the public controversy over park safety. Petitioner's lack of intent to advocate is demonstrated by the following factors: (1) Petitioner did not seek out the media for the interviews; (2) the media sought the interviews with Petitioner because he was the security guard who found the bomb (as opposed to seeking interviews with him to discuss

his views on park safety); (3) the interviews of Petitioner were dominated by his discussion of eyewitness information; (4) the very limited information Petitioner imparted, beyond strictly eyewitness information, was in response to unsolicited questions posed by reporters and were Petitioner's personal observations; and (5) Petitioner's unrebutted testimony that he did not agree to the interviews with an intent to influence the public on any issue. Under its open-ended approach, the Georgia Court of Appeals gave little or no weight to the above factors that established Petitioner's lack of any actual intent to advocate a particular outcome. Under its open-ended approach, the Georgia Court of Appeals was able to discern that an intent was "revealed" based on the prominence of Petitioner in the event, the number of interviews he gave and the fact that coverage of his comments would make an impression on the listeners and readers — in short, an assumption of intent by the lower court that directly conflicts with the holding in *Wolston* and is not permitted under *Firestone*.

When public figure status is asserted by a media defendant based on a private individual's contacts with the press, the inquiry under *Gertz* and its progeny is simple: did the individual seek to use the press contacts as a vehicle by which to thrust himself to the forefront of a public controversy in order to advocate a particular view? While Justice Blackmun did not see the need in *Wolston* to adopt "so restrictive a definition," this case demonstrates the necessity for this Court to grant review and reaffirm its restrictive approach to public figure status in order to draw the line between speech intended to inform and speech intended to advocate. The restrictive definition protects a private individual's legitimate exercise of the First Amendment right to participate in interviews requested by the media to disseminate first-hand information about a newsworthy event in response to questions posed by the media.

Adherence to a restrictive approach to public figure status is essential in view of the realities of the media era of the 21st Century — an era of instant worldwide communication where access to literally a world of information is only the touch of a home computer keyboard away; where local television stations and the major television networks compete against ever-increasing numbers of cable channels, satellite channels and pay-per-view channels; where "all-news" channels broadcast 24-hours a day; where television and the Internet blend together in interactive news channels and almost every major newspaper operates, or is affiliated with, an Internet website. Never before in the history of this country have members of the media faced the pressure of filling virtually unlimited hours of airtime and column inches with new and interesting faces and new and interesting stories in such a highly competitive media environment. Private individuals connected with almost any event deemed by the media to have some measure of news or entertainment value are increasingly finding themselves the subjects of press coverage and media requests for interviews as members of the media struggle to find different faces, different stories and different angles to existing stories.

In the media era of the 21st Century, this Court should encourage those private individuals to step forward and exercise their First Amendment right to inform the public without the fear that in so doing, they will be deemed to have relinquished, to any degree, their interest in the protection of their own name. Review and reversal of the Georgia Court of Appeal's decision is necessary so that this Court does not sanction the legal doctrine that an individual who is suddenly and involuntarily thrust as a key figure in a public event must censor his comments and reject any role in a public discussion of the event upon pain of being effectively stripped of his ability to vindicate his reputation by reliance on state law protections against defamation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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29. Counsel acknowledges the assistance of Ms. Mahaley C. Paulk in the preparation of this Petition.

APPENDIX A — OPINION OF THE COURT OF APPEALS OF GEORGIA, THIRD DIVISION DATED OCTOBER 10, 2001

THIRD DIVISION
JOHNSON, P. J.,
RUFFIN AND ELLINGTON, JJ.
OCTOBER 10, 2001

IN THE COURT OF APPEALS OF GEORGIA

A01A1564, A01A1566.
THE ATLANTA JOURNAL - CONSTITUTION et al. v. JEWELL (two cases). - JO-069 JO-071

A01A1565. JEWELL v. COX ENTERPRISES, INC et al. JO-070

JOHNSON, Presiding Judge.

These cases arise from coverage by the Atlanta Journal-Constitution of the 1996 bombing in Centennial Olympic Park and Richard Jewell's involvement in that incident. The initial media coverage of the Olympic Park bombing portrayed Jewell as a hero for his role in discovering the bomb, alerting authorities, and evacuating bystanders from the immediate vicinity, no doubt saving lives. Subsequently, however, the FBI focused its investigation on Jewell. The resulting media coverage of the criminal investigation caused Jewell and his family considerable anguish, while converting Jewell's status from hero to suspect. The investigation ultimately cleared Jewell of any involvement in the bombing. And through subsequent media

coverage of the investigation, his role in these events has once again been depicted as the positive role it was originally believed to be.

In Case Number A01A1564, the Atlanta Journal-Constitution seeks review of a June 1999 trial court order holding two of its reporters in contempt and ordering them incarcerated indefinitely for failing to disclose the identities of confidential news sources who provided information regarding Jewell's status in the Olympic Park bombing investigation.[1] In Case Number AO1A1565, Jewell seeks review[2] of an October 1999 trial court order finding him to be a limited purpose public figure for purposes of his defamation action. In Case Number AO1A1566, the Atlanta Journal-Constitution seeks review of the trial court's refusal to grant its motion for judgment on the pleadings and its motion for summary judgment.

Case Number A01A1564

Throughout this case, the Atlanta Journal-Constitution has consistently refused to provide Jewell with the names of confidential sources who allegedly provided its reporters with information concerning Jewell's status in the investigation of the Olympic Park bombing. On February 26, 1998, Jewell filed a motion to compel discovery, specifically requesting the names of the Atlanta Journal-Constitution's confidential

1. One of the two reporters named in the action, Kathy Scruggs, is now deceased. The appeal from the contempt order insofar as it applies to her is moot.

2. Pursuant to OCGA § 5-6-34 (b).

sources. The trial court granted Jewell's motion to compel, finding that no reporter's privilege exists in Georgia for a reporter in a libel case, where the reporter is also a party to the case. Subsequently, counsel for the Atlanta Journal-Constitution instructed a deponent not to answer questions regarding the confidential informants. On May 8, 1998, the Atlanta Journal-Constitution filed a motion seeking a protective order precluding discovery of the reporters' confidential sources. The trial court denied this motion.

Jewell filed a motion for sanctions, asking that the newspaper and its reporters be held in contempt of court based upon their knowing, willful, conscious, deliberate, and public refusal to obey the trial court's order requiring them to reveal their confidential sources. On December 15, 1998 and again on March 16, 1999, the trial court ordered the Atlanta Journal-Constitution to reveal information about its confidential sources. The Atlanta Journal-Constitution and its reporters refused to comply with the trial court's orders. As a result of their "willful and continued disobedience," the trial court held the Atlanta Journal-Constitution and the two reporters in civil contempt on June 3, 1999, and ordered the incarceration of the two reporters until such time as they disclosed their confidential sources as required by the trial court's discovery orders. This appeal followed. As to that portion of the appeal regarding defendant Kathy Scruggs, the matter is now moot. As to the remaining defendants, for the reasons discussed below, we vacate the orders requiring disclosure of the reporters' confidential sources, as well as the contempt order, and remand the case to the trial court with direction that it revisit the issue in a manner consistent with this opinion.

Appendix A

1. In every case where a person is charged with contempt of court for alleged violations of a court's order, the legal correctness of the underlying order may be challenged on appeal. However, "if the trial court has jurisdiction to make the order, it must be obeyed however wrong it may be"[3] until the order is superseded or vacated.[4] The thrust of the appeal in this case is a challenge to the correctness of the discovery orders compelling the defendants to disclose their confidential sources. Our determination that these underlying orders are erroneous and must be vacated also has the effect of dissolving the civil contempt order which is based upon the violation of these discovery orders.

During discovery Jewell sought the disclosure of certain confidential sources that the Atlanta Journal-Constitution and its reporters relied upon in publishing allegedly defamatory statements. The Atlanta Journal-Constitution argues that these communications are privileged and protected by the First Amendment and by statute. Thus, the first issue raised in this appeal is whether the Atlanta Journal-Constitution and its reporters have a privilege against revealing the identification of confidential informants in a case where they are parties. This does not present a new or novel question of law, as it is well-settled in the jurisprudence of the United States Supreme Court, and the Georgia appellate courts. It has been expressly addressed by an Act of the Georgia legislature as well. The Atlanta Journal-Constitution and its reporters have no such privilege.

3. Pearson v. George, 211 Ga. 18 (83 SE2d 593) (1954).

4. See Gilbert v. E & W Construction Company, Inc., 181 Ga. App. 281 at 284 (351 SE2d 523) (1986).

Appendix A

The United States Supreme Court has declined to recognize or create a testimonial privilege for journalists under the First Amendment to the United States Constitution:

> Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do.[5]

The Atlanta Journal-Constitution claims that such a privilege is necessary to maintain a free press, but this argument has been considered and rejected by the United States Supreme Court, where Justice White, in his assessment of such an argument, wrote for the Court:

> We are admonished that refusal to provide a First Amendment reporter's privilege will undermine the freedom of the press to collect and disseminate news. But this is not the lesson history teaches us. As noted previously, the common law recognized no such privilege, and the constitutional argument was not even asserted until 1958. From the beginning of our country the press has operated without constitutional protection for press informants, and the press has flourished. The existing constitutional rules have

5. See *Branzburg v. Hayes*, 408 U.S. 665, 708 (92 SC 2646, 33 LE2d 626) (1972) (plurality opinion).

> not been a serious obstacle to either the development or retention of confidential news sources by the press.[6]

Georgia's appellate courts have likewise found that the state constitutional right to a free press does not protect a reporter from disclosing the identity of a confidential source.[7] Aside from the constitutional issues, both the Georgia Supreme Court and this Court have consistently held that under Georgia law, there is no common law privilege protecting a reporter's decision to refuse to disclose his or her confidential sources.[8]

As for any statutory privilege, OCGA § 24-9-30 speaks directly to the issue. This statute establishes a qualified privilege for persons engaged in the gathering and dissemination of news. It provides that a reporter does not have to reveal his or her sources unless the privilege has been waived or it is shown that the information sought is material and relevant, cannot be reasonably obtained by other means, and is necessary to the proper presentation or preparation of the case of a party seeking the information, documents, or items.[9]

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6. *Branzburg,* supra at 698-699.

7. *Howard v. Savannah College &c., Inc.*, 259 Ga. 795 (387 SE2d 332) (1990); *Vaughn v. State,* 259 Ga. 325, 326 (1) (381 SE2d 30) (1989).

8. See *Plunkett v. Hamilton,* 136 Ga. 72, 81-84 (7) (70 SE 781) (1911); *Georgia Communications Corp. v. Horne,* 164 Ga. App. 227, 228 (1) (294 SE2d 725) (1982).

9. OCGA § 24-9-30.

The trial court correctly concluded, however, that the Atlanta Journal-Constitution and its reporters cannot rely on the qualified privilege established in OCGA § 24-9-30 because the language of the statute specifically provides that this qualified privilege only applies "where the one asserting the privilege is not a party." The qualified privilege simply is not available to one asserting the privilege who is a party to the lawsuit.[10] Since the Atlanta Journal-Constitution and its reporters are named defendants in this action, they cannot rely upon the qualified privilege afforded by OCGA § 24-9-30. In deciding this issue, the trial court properly declined to apply the three-part balancing test set out in the statute. However, as discussed below, other provisions of Georgia law require the trial court to balance the interests of the parties in virtually the same manner as the statute would require if it applied here.

2. Although the Atlanta Journal-Constitution and its reporters may not rely upon any privilege in refusing to reveal the identities of confidential informants in a case where they are parties, the trial court's inquiry does not end there. For although there is no federal or state constitutional privilege, legislative act or common law which protects against the disclosure of confidential sources, there is a strong public policy in favor of allowing journalists to shield the identity of their confidential sources unless disclosure is necessary in order to meet other important purposes of the law. This public policy is not only reflected in the statute creating the qualified privilege discussed above, but also in jurisprudence regarding the protection of all sensitive

10. See *In re Paul*, 270 Ga. 680, 684-685 (513 SE2d 219) (1999).

material under the protective order provisions of the discovery rules. Thus, the trial court must consider the general rules regarding protective orders in discovery disputes.

Under OCGA § 9-11-26 (b) (1), a party may only obtain discovery "which is relevant to the subject matter involved in the pending action" and "appears reasonably calculated to lead to the discovery of admissible evidence." A trial court has wide discretion in entering orders to prevent the use of discovery directed to irrelevant or immaterial matter.[11]

Under general discovery rules applicable to all parties, not only must a trial court determine whether the requested discovery is relevant and material, but when parties seek discovery of unprivileged but sensitive materials, the trial court must balance the requesting party's specific need for the material against the harm that would result by its disclosure.[12] Even where a privilege is unavailable, there is a strong public policy favoring the protection of the confidentiality of journalists' sources consistent with that favoring the protection of other types of sensitive information during discovery. Thus, the trial court was obligated under OCGA § 9-11-26 to balance Jewell's need for the identities of the confidential informants against the Atlanta Journal-Constitution's interest in protecting the privacy of the confidential informants and the freedom of the press in general. The Atlanta Journal-Constitution correctly claims

11. *Mead Corp. v. Masterack,* 243 Ga. 213, 215 (253 SE2d 164) (1979).

12. *Ledee v. Devoe,* 225 Ga. App. 620, 625 (2) (484 SE2d 344) (1997) (physical precedent only).

the court was obligated to apply this balancing test before requiring it to reveal the identities of its confidential informants.

Jewell claims the Atlanta Journal-Constitution did not properly raise this argument because it did not move for a protective order until after the trial court had ruled on Jewell's motion to compel. However, because the Atlanta Journal-Constitution did assert that Jewell's motion to compel should be denied, arguing that he was not entitled to the information he sought and that its interest in protecting the informants' identities outweighed Jewell's need for the information, we find that the issue is properly before us. The trial court was obligated to apply this balancing test to determine whether Jewell's discovery requests sought irrelevant and unnecessary information or subjected the Atlanta Journal-Constitution to "annoyance, embarrassment, oppression, or undue burden or expense."[13]

The record shows the trial court recognized the parties' competing interests and made an effort to balance these interests. In ruling upon the matter, the trial judge said:

> As expressed in previous Orders, the Court is fully cognizant of the role which confidential sources play in the robust collection and reporting of the news and the vital functions which news-gathering entities perform in [a] free society. To the extent that compelling confidential sources may tend to deter other persons from revealing sensitive information, thereby reducing the information

13. OCGA § 9-11-26 (c).

> available to the public, that is a regrettable but unavoidable secondary effect of legal investigation; the object of which is also the discovery of the truth.

While it is clear that the trial court attempted to strike some balance between Jewell's need for the information against the Atlanta Journal-Constitution's desire to maintain the confidentiality of its informants, we do not believe the trial court properly considered all of the competing interests.

To properly perform this balancing test in a libel case, the trial court must require the plaintiff to specifically identify each and every purported statement he asserts was libelous, determine whether the plaintiff can prove the statements were untrue, taking into account all the other available evidentiary sources, including the plaintiff's own admissions, and determine whether the statements can be proven false through the use of other evidence, thus eliminating the plaintiff's necessity for the requested discovery. In other words, if Jewell cannot succeed on a specific allegation of libel as a matter of law, or if Jewell is able to prove his specific allegation through the use of available alternative means, then the trial court's balancing test should favor non-disclosure of confidential sources. If, on the other hand, a specific allegation of libel is determined to be legally viable, or if it cannot be determined whether the allegation is legally viable given the current state of the record, and if the identity of the sources is either relevant and material in and of itself, or is the only available avenue to other admissible evidence, then the trial court's balancing test should favor disclosure of the confidential sources.

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We recognize that, in many respects, the application of this balancing test will involve legal analysis similar to, perhaps even identical to, that required in ruling upon a motion for summary judgment. This will inevitably thwart the trial court's expressed desire to avoid piecemeal adjudication. However, since we cannot ascertain from the record whether the trial court properly applied the balancing test separately to each of Jewell's precise allegations, we vacate the judgments holding the reporters in contempt of court, as well as the orders requiring disclosure of the reporters' confidential sources, and remand this case to the trial court for the judge to perform the balancing test in accordance with this opinion. We suggest an analytical framework which would require Jewell to precisely identify by date, page, and line each published statement he alleges libels him. The trial court should then look to the entire record to determine if each particular claim is legally viable, and if it is, the trial court can then perform the necessary balancing test as to each legally viable allegation of libel. If, for example, a plaintiff in a libel case alleged that a certain statement was libelous while admitting in another statement that the fact was true, his burden of proving that the statement was false could not possibly be met. His libel action as to that statement would not be legally viable, and there should be no order requiring the defendant to disclose the confidential source of that statement.

Case Number A01A1565

Jewell moved for partial summary judgment, asserting the trial court should find that he is a private, versus a public, figure. Specifically, the trial court was asked to determine

whether, by his public appearances, Jewell became a limited-purpose public figure prior to the Atlanta Journal-Constitution's public disclosure that he was under investigation in connection with the bombing of the Olympic Park. The trial court determined that Jewell is a "voluntary limited purpose public figure" and thereby required him to meet the actual malice standard of proof set forth in *New York Times v. Sullivan*[14] in this defamation action. Jewell appeals this ruling.

In considering this issue, we repeat the basic facts of the case. At the time of the park bombing, Jewell was working as a security guard in the park. Shortly before the explosion, he spotted a suspicious and unattended package and reported its existence to the GBI. Around the same time, an anonymous 911 call informed police that a bomb had been placed in the park. After he reported the existence of the package, and at a time when police believed the package contained a bomb but did not know when it would explode, Jewell assisted police in moving park patrons away from the package. He also assisted in the evacuation of the five-story tower where the package was located.

Following the explosion of the bomb, but before he became a suspect, Jewell granted one photo shoot and ten interviews. He gave an interview with a reporter from the Boston Globe in which he was quoted regarding the events following his discovery of the package. He gave a live television interview with a CNN reporter which was rebroadcast several times, including on The Larry King Show.

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14. 376 U.S. 254, 279-280 (84 SC 710, 11 LE2d 686) (1964).

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In this interview, Jewell related the events and praised the professionalism of emergency personnel. He also discussed his six years of law enforcement training and expressed his hope that following the Olympic Games he would be employed by a law enforcement agency in the Atlanta area. Jewell gave another interview with a CNN reporter in which he recounted the events surrounding the bombing. He reportedly said "that he hoped his efforts would help his career in law enforcement." He granted a USA Today interview in which he was extensively questioned regarding the events surrounding the bombing and his personal actions after he found the package. He was quoted as saying that personnel performed their jobs properly, and again remarked that he hoped to get a job in the Atlanta area after the Olympics. In the meantime, however, he said he would be back at his post, guarding the Olympic venues. He gave an interview with the Atlanta Journal-Constitution in which he was quoted regarding his efforts and the credit due other law enforcement officers. On another occasion Jewell submitted to a session with a photographer for the Atlanta Journal-Constitution. He appeared on television station WXIA-TV for an interview which was replayed every half hour from 5:00 a.m. through 7:00 a.m., during which Jewell spoke of the professionalism and heroism of emergency personnel in acting promptly and saving lives. He gave a telephone interview on CNN's "Talk Back Live" program in which he described the training he and other personnel received in preparation for the Olympic Games, spoke again of his six years in law enforcement in Georgia, and of the professionalism of the security, law enforcement and paramedic personnel. In this interview, Jewell praised the

members of the public who continued to attend Olympic events and encouraged them "to show this person or persons that this type of activity would not be tolerated in this world." He was interviewed by anchorwoman Katie Couric on NBC's Today Show, where he spoke of his role in discovering the package, the training provided to security personnel regarding suspicious packages, and the response of security personnel. The real heroes, according to Jewell in this interview, were the emergency personnel who risked themselves to protect the safety of the people remaining in the vicinity of the bomb. Following his appearance on the Today Show, Jewell participated in another interview with an NBC reporter, though this interview was not broadcast. He was also interviewed by an unknown reporter following his appearance on the Today Show.

Four days after the bombing, the Atlanta Journal-Constitution published a front-page article headlined "FBI suspects 'hero' guard may have planted bomb." Subsequently, Jewell alleges, approximately 19 articles portrayed him as an individual who was guilty or likely guilty of criminal involvement in the bombing, who had a motive for the bombing, and who had an aberrant personality and a bizarre employment history.

3. The central issue presented by this appeal is whether Jewell, as the plaintiff in this defamation action, is a public or private figure, as those terms are used in defamation cases. This is a critically important issue, because in order for a "public figure" to recover in a suit for defamation, there must be proof by clear and convincing evidence of actual malice

on the part of the defendant.[15] Plaintiffs who are "private persons" must only prove that the defendant acted with ordinary negligence.[16] Jewell contends the trial court erred in finding that he is a "public figure" for purposes of this defamation action. We disagree.

The definitive case on how a private citizen becomes a public figure for purposes of a defamation action is *Gertz v. Robert Welch, Inc.*, which held:

> Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classified as public figures . . . For the most part those who attain this status have assumed roles of special prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.[17]

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15. See *New York Times Co.*, supra.

16. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (94 SC 2997, 41 LE2d 789) (1974); *Triangle Publications, Inc. v. Chumley*, 253 Ga. 179, 180-182 (1) (317 SE2d 534) (1984).

17. *Gertz*, supra at 342, 345.

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The trial court held that Jewell is a voluntary limited-purpose public figure. Jewell argues that he is not because he did not assume a role of special prominence in the controversy over the safety of Olympic Park, he did not voluntarily thrust himself to the forefront of the controversy of the safety of Olympic Park, and he did not intentionally seek to influence the resolution or outcome of any public controversy surrounding the safety of Olympic Park. Jewell further claims that the alleged defamation in this case is not germane to his participation in the controversy over safety at Olympic Park.

In *Silvester v. American Broadcasting* Cos.,[18] the Eleventh Circuit adopted a three-prong test to determine whether a person is a limited-purpose public figure. Under this test, the court must isolate the public controversy, examine the plaintiff's involvement in the controversy, and determine whether the alleged defamation was germane to the plaintiff's participation in the controversy. Whether a person is a public figure, general or limited, is a question of law for the court to resolve.[19]

a. In isolating the public controversy, the court must look to those controversies that are already the subject of debate in the public arena.[20] The trial court dismissed Jewell's argument that the public controversy was "who bombed the

18. 839 F2d 1491, 1494 (11th Cir. 1988).

19. *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1293 n.12 (D.C. Cir. 1980).

20. *Waldbaum*, supra at 1297.

Olympic Park," finding this too narrowly defined the controversy. According to the trial court, the public controversy following the bombing and prior to the alleged defamatory statements included the broader question of the safety of the general public in returning to the Olympic Park area. Safety of the park and other Olympic venues after the bombing involved a real dispute. The outcome of that dispute would affect the general public or some segment of it in an appreciable way; and the ramifications of the dispute would be felt by persons who were not direct participants in the public discussion.[21] Neither party argues on appeal that the trial court erred in reaching this conclusion.

b. The trial court next examined Jewell's involvement in the controversy. A plaintiff in a libel case must be deemed a public figure if he purposefully tries to influence the outcome of a public controversy or, because of his position in the controversy, could realistically be expected to have an impact on its resolution.[22] A tangential involvement is insufficient.[23] In examining the nature and extent of Jewell's participation in the issue of Olympic Park safety, the court can look to Jewell's past conduct, the extent of press coverage, and the public reaction to his conduct and statements.[24] The court must examine these factors as they

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21. *Waldbaum*, supra; *Silvester*, supra at 1494.

22. *Silvester*, supra at 1496.

23. *Silvester*, supra.

24. *Waldbaum*, supra at 1297.

existed before the alleged defamation was published.[25] An analysis of these factors shows that Jewell assumed a role of special prominence in the Olympic Park safety debate.

While Jewell asserts that his media role was limited to that of an eyewitness and that he did not attempt to shape the resolution of any controversy, Jewell's participation in interviews and the information he related about the controversy was not so circumscribed. In fact, the extensive media coverage Jewell received as the individual who discovered the bomb and helped evacuate the public led one federal judge to describe him as a "media hero."[26] The Detroit News headlined its article about the bombing: "Hero: Keen eyesight, level head thrust guard into spotlight."

While we can envision situations in which news coverage alone would be insufficient to convert Jewell from private citizen to public figure, we agree with the trial court that Jewell's actions show that he voluntarily assumed a position of influence in the controversy. Jewell granted ten interviews and one photo shoot in the three days between the bombing and the reopening of the park, mostly to prominent members of the national press. While no magical number of media appearances is required to render a citizen a public figure, Jewell's participation in the public discussion of the bombing exceeds what has been deemed sufficient to render other

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25. *Waldbaum*, supra at 1295 n.19.

26. *In re Four Search Warrants*, 945 F.Supp. 1563, 1564 (N.D. Ga. 1996).

citizens public figures.[27] Even Jewell commented that the number of interviews he gave — up to two or three within a 15 minute period — was so great that he still cannot remember them all. The fact is that Jewell was prominent enough to require the assistance of a media handler to field press inquiries and coordinate his media appearances.

"By publishing your views you invite public criticism and rebuttal; you enter voluntarily into one of the supermarkets of ideas and opinions and consent therefore to the rough competition of the marketplace."[28] Jewell stated that he had spotted the bag after a group of rowdy, college-aged men had left the park. And he announced on CNN that he had matched one of the men to a composite sketch. These statements gave the impression that police had solid leads and the park was safe. Jewell also repeatedly offered assurances that his training had been sufficient to handle the situation, that other law enforcement personnel had received adequate training to handle the situation, and that law enforcement personnel did all they could in response to the situation. In addition, Jewell spoke with a television crew conducting interviews on whether the Olympic games should continue and whether the park should reopen. He offered encouragement to members of the public who had continued coming to the Olympic Games.

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27. See *Finkelstein v. Albany Herald Publishing* Co., 195 Ga. App. 95, 97 (1) (392 SE2d 559) (1990) (one appearance on a local television program and quotes in one newspaper article criticizing district attorney sufficient to make plaintiff a limited-public figure).

28. *Dilworth v. Dudley*, 75 F.3d 307, 309 (7th Cir. 1996).

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Jewell should have known, and likely did know, that his comments would be broadcast and published to millions of American citizens searching for answers in the aftermath of the bombing. Clearly, his repeated comments regarding the adequacy of the law enforcement preparation, the appropriateness of the response to the bombing, and the safety of those returning to the park could realistically be expected to have an impact on the controversy's resolution.

Jewell claims he only gave the interviews to accommodate the desires of his employer and that he never intended to have any influence on the matters. Whether a person has voluntarily injected himself into a public controversy in order to have an impact on its outcome cannot be determined solely by reference to the actor's subjective motives. The court must ask whether a reasonable person would have concluded that Jewell would play or was seeking to play a major role in determining the outcome of the controversy.[29] Viewed objectively, Jewell's numerous media appearances in the days following the bombing reveal that he attempted to improve the public's perception of security at the park. The media spokesman who facilitated many of the interviews told Jewell he was under no obligation to do any interviews, but Jewell nevertheless voluntarily made media appearances. This evidence was sufficient to support the trial court's determination that Jewell was a voluntary limited-purpose public figure.

Furthermore, the United States Supreme Court has held the actual malice rule is applicable whenever "an individual

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29. *Waldbaum*, supra at 1298.

voluntarily injects himself *or is drawn into* a particular public controversy."[30] The evidence in this case, at the very least, supports a finding that Jewell was initially drawn into the controversy unwillingly and thereafter assumed a prominent position as to its outcome.[31] Jewell did not reject any role in the public controversy debate, was a prominent figure in the coverage of the controversy and, whatever his reticence regarding his media appearances, encountered them voluntarily. "[I]t is no answer to the assertion that one is a public figure to say, truthfully, that one doesn't choose to be. It is sufficient . . . that [Jewell] voluntarily engaged in a course that was bound to invite attention and comment."[32] The trial court did not err in finding that Jewell met the second prong test of *Silvester.*

c. The third prong of the *Silvester* test requires the court to ascertain whether the allegedly defamatory statements were germane to Jewell's participation in the controversy.[33] Anything which might touch on the controversy is relevant.[34] Misstatements wholly unrelated to the controversy do not require a showing of actual malice to be actionable.[35]

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30. See *Gertz*, supra at 351.

31. See *Silvester*, supra at 1496.

32. (Citation and punctuation omitted.) *Silvester*, supra at 1496.

33. *Silvester*, supra at 1497.

34. See *Waldbaum*, supra.

35. *Waldbaum*, supra at 1298.

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As recognized in *Waldbaum*, a publication is germane to a plaintiff's participation in a controversy if it might help the public decide how much credence should be given to the plaintiff.[36] Here, Jewell was on the scene in his role as a security guard, he found the bomb and reported its existence to authorities, and he helped evacuate people from the scene. During interviews, he discussed his participation in the events, his previous training, the training and reactions of other law enforcement personnel on the scene, and urged the public to show the bomber that this type of activity would not be tolerated.

Certainly, the information reported regarding Jewell's character was germane to Jewell's participation in the controversy over the Olympic Park's safety. A public figure's talents, education, experience, and motives are relevant to the public's decision to listen to him.[37] The articles and the challenged statements within them dealt with Jewell's status as a suspect in the bombing and his law enforcement background.

4. Even if the trial court erred in finding that Jewell was a voluntary limited-purpose public figure, the record contains clear and convincing evidence that, at the very least, Jewell was an involuntary limited-purpose public figure. While, in general, a public figure voluntarily puts himself into a position to influence the outcome of the controversy, "[o]ccasionally, someone is caught up in the controversy involuntarily and, against his will, assumes a prominent

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36. *Waldbaum*, supra.

37. Id.

position in its outcome. Unless he rejects any role in the debate, he too has 'invited comment' relating to the issue at hand."[38] The decision in *Dameron v. Washington Magazine*[39] provides an excellent example of the types of circumstances in which an individual can become an involuntary public figure.

In *Dameron*, the plaintiff claimed defamation in connection with a magazine article that mentioned his role as the sole air traffic controller on duty at the time of a notorious airliner crash. Although the plaintiff had not availed himself of the media to speak on the public issues relating to the crash, he was nonetheless held to be an involuntary public figure.[40] The plaintiff's sole role in the controversy over the cause of the crash was that he was the air traffic controller on duty at the time of the crash and he subsequently testified at an NTSB hearing on the crash.

The same considerations that led the *Dameron* court to find the plaintiff in that case was an involuntary public figure require the same conclusion in this case. Even if we found that Jewell did not "inject" himself into the controversy, "[i]njection is not the only means by which public-figure status is achieved. Persons can become involved in public controversies and affairs without their consent or will."[41] Jewell, who had the misfortune to have a tragedy occur on his watch, is such a person.

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38. *Waldbaum*, supra; *Silvester*, supra et 1496.

39. 779 F.2d 736, 741-742 (D.C. Cir. 1985).

40. *Dameron*, supra at 740-743.

41. *Dameron*, supra at 741.

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Like the plaintiff in *Dameron*, Jewell was an ordinary citizen who was unknown to the public before the Olympic Park bombing, never sought to capitalize on the fame he achieved through his actions in events surrounding the bombing, and never acquired any notoriety apart from the bombing and the investigation which followed. However, there is no question that Jewell played a central, albeit possibly involuntary, role in the controversy over Olympic Park safety. Jewell happened to be the security guard on duty at the time of the bombing, happened to be the security guard who found the bomb, and happened to be involved in the evacuation of the public from the area where the bomb was located. He became embroiled in the ensuing discussion and controversy over park safety, and became well known to the public in this one very limited connection. Whether he liked it or not, Jewell became a central figure in the specific public controversy with respect to which he was allegedly defamed: the controversy over park safety.

Case Number A01A1566

5. In this appeal, the Atlanta Journal-Constitution seeks review of the trial court's refusal to grant its motion for judgment on the pleadings and its motion for summary judgment. The record shows that the Atlanta Journal-Constitution's motion for judgment on the pleadings was filed on March 27, 1997, but was withdrawn on August 21, 1998. Because it had been withdrawn, the trial court never ruled upon the merits of that motion, and there is no ruling for us to review. The withdrawal of the motion renders the matter moot, and mootness is a mandatory ground for dismissal of an appeal.[42]

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42. OCGA § 5-6-48 (b) (3).

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The Atlanta Journal-Constitution's motion for summary judgment was filed on December 22, 1998. On March 16, 1999, based on the newspaper's refusal to obey the trial court's discovery orders, the trial court issued an order in which it ruled that a decision on the Atlanta Journal-Constitution's motion for summary judgment would be deferred until discovery, including the newspaper's compliance with Jewell's discovery requests, was completed.

At the time this appeal was filed, the discovery issues raised in Case Number AO1A1564 had not been resolved. Consequently, the trial court had not scheduled a hearing on the Atlanta Journal-Constitution's motion for summary judgment.

6. Jewell has filed a motion to dismiss this appeal on the basis that this Court lacks jurisdiction to consider the appeal because there is no ruling by the trial court for us to review. As this Court recently explained in *Waters v. Glynn County:* "Where a trial court does not rule on an issue, it remains outside the jurisdiction of this Court and we cannot consider it."[43] This is particularly true when the record below shows that a trial court has not ruled on a motion for summary judgment.[44]

We have noted that the Atlanta Journal-Constitution's motion for judgment on the pleadings was rendered moot

43. 237 Ga. App. 438, 441 (4) (514 SE2d 680) (1999).

44. See *Hardin v. Leitch*, 232 Ga. App. 432, 433 (2) (502 SE2d 288) (1998) (a motion for summary judgment that has not been ruled upon is not ripe for review).

when it was withdrawn on August 21, 1998. Regarding the trial court's refusal to grant the Atlanta Journal-Constitution's motion for summary judgment, it is clear that any arguments in this regard are not ripe for review by this court. Enumerations of error relating to a motion for summary judgment which have not yet been ruled upon are not ripe for appellate review because there has been no ruling below, and this Court may not address these issues in the first instance.[45]

7. Even if we construe the Atlanta Journal-Constitution's enumerations of error as appealing the trial court's order deferring a ruling on the Atlanta Journal-Constitution's motion for summary, the argument fails. It was within the trial court's discretion to defer a ruling in this case, especially in light of the Atlanta Journal-Constitution's continued refusal to comply with the trial court's orders concerning discovery. The Atlanta Journal-Constitution's refusal to comply with the trial court's orders compelling discovery directly resulted in the trial court's refusal to rule on the motion for summary judgment. On appeal, one cannot complain of a judgment, order, or ruling that his own procedure or conduct aided in causing.[46]

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45. *Hardin*, supra. See also *Paulsen Street Investors v. EBCO General Agencies*, 224 Ga. App. 507, 508 (481 SE2d 246) (1997) (where issues are not ruled upon by the trial court, they are outside the jurisdiction of this Court); *Sharpnack v. Hoffinger Indus.*, 223 Ga. App. 833, 836 (3) (479 SE2d 435) (1996) (trial court's failure to grant or deny motion for summary judgment leaves this Court with no jurisdiction to consider the issues raised by the motion).

46. *Studdard v. Satcher, Chick, Kapfer, Inc.*, 217 Ga. App. 1, 3 (456 SE2d 71) (1995).

Moreover, it is beyond dispute that our decision as to the issues in cases AO1A1564 and AO1A1565 will have a direct and significant impact on the trial court's ruling on the motion for summary judgment. Until it was determined with finality whether Jewell is to be considered a private or public citizen, the standard of proof necessary for Jewell to maintain his claim was unsettled. It has only now been finally determined that as a public figure, Jewell must show by clear and convincing evidence that false and defamatory statements were published with actual malice.[47] Had we determined that Jewell acted as a private citizen, he would have been required only to show by a preponderance of the evidence that false and defamatory statements were negligently published.[48] Thus, before the trial court could properly rule on the Atlanta Journal-Constitution's motion for summary judgment, it had to know with finality whether Jewell is a private citizen or a public figure plaintiff,[49] something the trial court could not know until the decision in these appeals was rendered. Since discovery in this case was ongoing, the trial court did not err in refusing to rule on the Atlanta Journal-Constitution's motion for summary judgment.

For these reasons, Jewell's motion to dismiss this appeal is hereby granted. *Judgment vacated and case remanded with directions in Case Number AO1A1564; judgment affirmed in Case Number AO1A1565; appeal dismissed in Case Number AO1A1566. Ruffin and Ellington, JJ., concur.*

47. *St. Amant v. Thompson*, 390 U.S. 727, 731 (88 SC 1323, 20 LE2d 262) (1968).

48. *Triangle Publications*, supra at 180.

49. See generally *Barber v. Perdue*, 194 Ga. App. 287 (390 SE2d 234) (1989).

APPENDIX B — ORDER OF THE STATE COURT OF FULTON COUNTY, STATE OF GEORGIA DATED AND FILED OCTOBER 5, 1999

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

CIVIL ACTION
FILE NO 97 VS 0122804

RICHARD JEWELL

Plaintiff,

v.

COX ENTERPRISES, INC d/b/a THE ATLANTA CONSTITUTION, THE ATLANTA JOURNAL, THE ATLANTA JOURNAL-CONSTITUTION, et al.

Defendants.

ORDER

The above styled case came regularly before the Court and was heard on Plaintiff's Motion For Partial Summary Judgment. All parties were represented by counsel. After considering the entire record, the briefs of parties and applicable law, the Court issues the following ruling:

I

In the present motion the Court is called upon to determine whether Plaintiff, because of his media appearances, became a public figure for purposes of pursuing

this defamation action, thereby making applicable the actual malice standard announced in *New York Times v. Sullivan*, 376 U.S. 254 (1964). See *Gertz v. Robert Welch, Inc*, 418 U.S. 323 (1974). Plaintiff's media appearances consist of the several interviews granted, from July 27 to July 30, 1996, in the aftermath of the Olympic Park bombing but prior to his identification as a suspect in an article published by the Atlanta Journal Constitution on July 30, 1996. The court's analysis must necessarily focus on the status which Plaintiff occupied prior to the alleged defamatory publication otherwise one charged with defamation could, by publicizing a Plaintiff into a public figure, create its own defense. See *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Waldbaum v. Fairchild Publications*, 627 F.2d 1295 n.19 (1980). Resolution of this issue presents a mixed question of fact and law to be determined by the Court. *Brewer v. Rogers*, 211 Ga. App. 343 (1993).

During this four day period, Plaintiff granted eleven interviews which include:

July 27, 1996

1. Interview with a reporter from the Boston Globe in which Plaintiff is quoted regarding the events following his discovery of the knapsack.

2. Plaintiff is interviewed live by CNN reporter Jeanne Meserve which is rebroadcast several times and on Larry King Live. In this interview, Plaintiff relates the events witnessed and praises the professionalism of emergency personnel. In response to a question regarding the adequacy

of his training, Plaintiff tells of his six years of previous law enforcement experience and his hope that after the games he would become employed with law enforcement in the Atlanta area.

July 28, 1996

3. Interview with CNN reporter Art Harris in which Plaintiff recounts the events surrounding the bombing. According to Harris, Plaintiff reportedly said "that he hoped his efforts would help his career in law enforcement."

4. USA Today interview in which Plaintiff is extensively interviewed regarding the events of the bombing and his actions after finding the package.

5. In an AJC article, Plaintiff is quoted regarding his efforts and comments on the credit due other law enforcement officers.

6. Plaintiff sat for a photo shoot at Centennial Olympic Park with William Berry of the Atlanta Journal-Constitution.

7. Plaintiff is interviewed by Keith Whitney of WXIA-TV, which is replayed every half hour from 5-7 a.m. Plaintiff again speaks of the professionalism and heroism of emergency personnel in acting promptly and saving lives.

July 29, 1996

8. During a telephone interview on CNN's "Talk Back Live," Plaintiff describes the training he and other personnel

received in preparation for the Olympics. Plaintiff also spoke of his six years of law enforcement in Georgia and again of the professionalism of the security, law enforcement and paramedic personnel. The Olympic audience attending the games was also praised by Plaintiff for continuing to come to the games and encouraged "to show this person or persons that this type of activity will not be tolerated in the world."

July 30, 1996

9. Katie Couric of NBC's The Today Show, interviewed Plaintiff about his role in discovering the package. Plaintiff spoke of the training provided to security personnel regarding "suspicious" packages and the response of security personnel, including himself, to the discovery of the knapsack containing the bomb. The "real heroes" according to Plaintiff, were the emergency personnel who risked themselves to protect the safety of the public remaining in the vicinity of the explosion.

10. Following his appearance on The Today Show, Plaintiff participated in another interview by a NBC news reporter which was not aired.

11. Plaintiff was last interviewed by an unknown reporter following his appearance on The Today Show. It is not known whether this interview was ever aired.

II

A defamation action is a private suit at law to redress damage to reputation caused by another's false statement. Although defamation is primarily a state law cause of action,

it may also have profound First Amendment implications which require inquiry under federal law. See *Marcone v. Penthouse International Magazine for Men*, 754 F.2d 1072 (3rd Cir. 1985). Prior to the case of *New York Times v. Sullivan*, 376 U.S. 254 (1964), the common law action for defamation evolved among the states without regard to First Amendment considerations. In the aftermath of *Sullivan*, the common law of defamation has been displaced by federal constitutional law where the defamatory statements concern a particular class of plaintiff. In general terms, certain speech which is allegedly false and harmful to one's reputation is permitted a degree of constitutional protection from tort liability because not to do so would unduly restrict the flow of public discourse and would produce incongruous spheres of protected speech. Under the balance fashioned in the law, the erroneous statements of fact are rather suffered by the public official or public figure than the publisher whose self-censorship is invited under the common law rule of strict liability. The First Amendment requires that some amount of falsehoods be protected in order to protect the speech "that matters". *Gertz v. Robert Welch, Inc*, 418 U.S. 323 (1974).

To ensure that public discourse is not self-censored, the First Amendment, as incorporated through the Fourteenth Amendment, has been interpreted to require that a state law defamation plaintiff meet an enhanced standard of proof where that plaintiff is a public official, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), or a public figure. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). This extension of First Amendment protection is premised, in part, on self-help. The ability of the person defamed to counter the

aspersion in the public arena by virtue of his position or publicity affords a remedy which private persons do not enjoy. Furthermore, those who are public officials or are figures of special prominence invite public comment and can expect to endure public scrutiny. See *Gertz v. Robert Welch, Inc*, 418 U.S. 323 (1974).

The Supreme Court cases of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Gertz v. Robert Welch, Inc*, 418 U.S. 323 (1974), and their progeny, establish the principle that once a defamation plaintiff is determined to be a public official or figure, the First Amendment's guarantee of freedom of speech precludes recovery absent the almost insuperable showing of proof, by clear and convincing evidence, that the false statement was published with actual malice. Where the allegedly defamatory statement concerns a matter of only private concern regarding a private figure, no federal constitutional issues are raised and the states are generally left to enact what suitable remedies they may. Under Georgia law, a private figure need only prove his case by a negligence standard. *Triangle Publications, Inc., v. Chumley*, 253 Ga. 179 (1984).

III

1. Public Official

In responding to Plaintiff's Motion for Partial Summary Judgment, Defendant argues that Plaintiff should be deemed a public official as to statements published by the Atlanta Journal Constitution regarding his employment as a deputy sheriff with Habersham County. See *Pierce v. Pacific &*

Southern Co., 166 Ga. App. 113 (1983); *Sparks v. Thurmond, et al.*, 171 Ga. App. 138 (1984). In *Pierce v. Pacific & Southern Co.*, the Court noted that given the potential for abuse of office, the public has an especially strong interest in the qualifications and conduct of those charged with law enforcement, particularly the officer on the street, and criticism directed at the performance of that office should not be chilled by threat of a libel action. *Pierce v. Pacific & Southern Co.*, 166 Ga. App. 113 (1983). In both *Pierce* and *Sparks* the alleged defamatory statements occurred in the context of an active controversy of possible police misconduct.

What distinguishes the present facts from the holding in *Pierce* Id., is the diminished interest the public holds in a public official who is a *former* police officer and the absence of a prior public controversy regarding Plaintiff 's discharge of his duties. Plaintiff was not employed in law enforcement at the time of the Olympic bombing and his prior employment as a deputy sheriff in Habersham County ended over a year prior to the alleged defamation. Moreover, the implication of the alleged defamatory statements was not that the operation or performance of the Habersham County Sheriff's Department was somehow deficient. Rather, information regarding Plaintiff's background was reported because it was thought to be relevant to Plaintiff's credibility and also because it might tend to circumstantially infer Plaintiff's involvement in the bombing.

Defendant correctly notes that several federal circuits have held that a public official suing for defamation action must meet an actual malice standard even as to false

statements made after he has left office. These cases involve defamatory statements which relate to a previous public controversy involving the discharge of the public official's duties. *Milsap v. Journal Sentinel Inc.*, 100 F.3d 1265 (7th Cir. 1996); *Zerangue v. TSP Newspapers. Inc.*, 814 F.2d 1066 (5th Cir. 1987). "The circuits addressing the issue have indicated that an individual who was once a public figure with respect to a controversy remains a public figure for latter commentary *on that controversy.*" *Milsap v. Journal Sentinel, Inc.*, 100 F.3d 1265, 1269 (7th Cir. 1996). Because the alleged defamatory statements occurred well after Plaintiff had left his position in law enforcement and did not pertain to a prior, or existing, controversy regarding the discharge of his duties, the Court declines to find Plaintiff a public official and extend the actual malice standard to him on that basis.

2. Public Figures

Gertz recognizes that public figures fall into two broad categories: those persons whose pervasive notoriety is such that they are deemed public figures for all purposes and more commonly, those limited purpose public figures who have "thrust themselves to the forefront of particular controversies in order to influence the resolution of the issues involved." *Gertz v. Robert Welch, Inc*, 418 U.S. 323 at 345 (1974).

A person should not be deemed a general purpose public figure absent "clear evidence of general fame or notoriety in the community and pervasive involvement in the affairs of society . . ." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974). As Defendants do not contend that Plaintiff was a general purpose public figure at the time of the alleged

defamation, the Court must only determine if Plaintiff meets the definition of either a voluntary or involuntary limited purpose public figure.

The category of limited purpose public figures was sub-classified in *Gertz* Id., by the qualified recognition that one may become a public figure involuntarily. "(H)ypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare." *Id.* at 345. This enigmatic statement created a further division of public figures of those who because of their relation to, rather than purposeful entry into, a controversy must meet the actual malice standard. Significantly however, *Gertz* expressly overruled a prior holding in *Rosenbloom v. Metromedia Inc.*, 403 U.S. 29 (1971), which had extended the actual malice standard to false statements regarding private persons associated in a matter of general public interest.

In the aftermath of *Gertz*, the test for determining who is a voluntary limited purpose public figure received further refinement in the federal circuit cases of *Silvester v. American Broadcasting Co.*, 839 F.2d 1491 (11th Cir. 1988) and *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980). Under the framework announced in these cases, evaluated from the objective perspective of a reasonable person, one is to be deemed a limited purpose public figure if he attempts to have, or realistically can be expected to have, a major impact on the resolution of a specific public dispute. *Waldbaum v. Fairchild Publications. Inc.*, 627 F.2d 1287, 1292 (D.C. Cir. 1980). The Court must

(1) isolate the public controversy, (2) examine the plaintiff's involvement in the controversy, and (3) determine whether the alleged defamation was germane to the plaintiff's participation in the controversy. *Silvester v. American Broadcasting Co.* , 839 F.2d 1491, 1494 (11th Cir. 1988).

Because public controversies and public figures may have an amorphous quality, the process of definition has been described by one court as "exasperating," *Ali v. Daily News* Pub. *Co., Inc.*, 540 F. Supp. 142 (1982) and compared by another court to be "much like trying to nail a jelly fish to the wall." *Rosanova v. Playboy Enterprises*, 411 F. Supp. 440 (S.D. Ga. 1976).

Whatever the difficulties encountered in definition, for the controversy to be "public," the scope and resolution of the controversy must have substantial ramifications for non-participants. *Waldbaum*, 627 F.2d at 1296. The controversy need not be political, *Waldbaum*, 27 F.2d at 1297 note 25, but an event which merely attracts the public's attention as newsworthy but in which the public does not have a substantial stake in the outcome, does not suffice to produce a "public" controversy. See *Time, Inc. v. Firestone*, 424 U.S. 448 (1976). Plaintiff argues the public controversy to be the narrow issue of "who bombed the Olympic Park."

In determining what is a public controversy, the judiciary does not sit to make substantive judgments regarding what is a proper subject of debate as the subjectivity of such an approach would turn the courts into censors. Rather, the Courts must look to those controversies that are already the subject of debate in the public arena.

See *Waldbaum*, 627 F.2d at 1297. While the bombing and surrounding events in this case could be given a narrow construction under which they were merely newsworthy, the Court's analysis must objectively focus on whether persons beyond the immediate participants in the dispute could realistically expect to feel the resolution of the controversy in any of its dimensions. Since the safety of the general public returning to the Olympic Park was an obvious concern for non-participants in the controversy, the Court finds Plaintiff's definition of the debate being merely "who was responsible for the bombing" to be underinclusive. At least as to the issue of Olympic Park safety, the Court concludes that a public controversy, within the meaning of *Waldbaum* and *Silvester*, existed prior to the alleged defamatory publication.

Having specified the particular public controversy, the Court must then examine the role which Plaintiff sought to play in its resolution. A tangential involvement is insufficient. *Silvester*, 627 F.2d at 1496. Plaintiff must have purposely thrust himself to the forefront of the controversy in the attempt to influence the outcome or, through his special prominence in the debate, could have reasonably expected to have an impact on the resolution. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980).

While Plaintiff has asserted that his media role was limited to that of an eyewitness to history and that he did not attempt to shape the resolution of any controversy, the Court finds his participation in and the information related about the controversy was not so circumscribed. As the person who discovered the Olympic Park bomb and helped evacuate the

public, Plaintiff almost necessarily became someone who was newsworthy. The extensive media coverage Plaintiff received led one federal judge to describe him as a "media hero." *In re Four Search Warrants*, 945 F. Supp. 1563 (N.D. Ga. 1996). While news coverage alone would be insufficient to convert him to a public figure, Plaintiff granted eleven interviews in which he not only related the events witnessed but also spoke repeatedly of the training which he and others had received, commented on park safety, and encouraged the general public to return to the park. It is not contended, nor required under the law, that Plaintiff was a spokesperson or a person of supervisory authority on the issue of security for any private or government agency. Rather, Plaintiff spoke for only himself, using his credibility and newfound publicity to relieve the anxiety of the public. Whatever may have been Plaintiff's laudable motives in speaking out on these topics, his intention, viewed objectively, was to improve the public's perception of security at the Olympic Park in the presumed hope of influencing the resolution of this public controversy.

The accumulation of media appearances also enter into the Court's estimation of Plaintiff's prominence and ability to influence the controversy. In the immediate aftermath of the bombing, Plaintiff's name was mentioned extensively on CNN and other networks as the person primarily responsible for clearing the public away from the area of the package just prior to the explosion. Also, with each additional interview Plaintiff granted, he became a more salient figure in the controversy and statements which are made after several prior media appearances are entitled to be viewed as more purposeful and made after due reflection. Of his eleven media appearances, Plaintiff spoke most expansively regarding training and security in interviews chronologically numbered herein as 2, 8 and 9.

Appendix B

It may be true that Plaintiff's ability to influence any public question was probably short-lived. Certainly elected officials charged with providing security were also making media appearances to reassure the public and Plaintiff's ability to attract the attention of the media would have diminished with time. A limited purpose public figure is not defined by longevity however. During the brief period prior to his identification as a suspect, Plaintiff commanded the public's attention because his actions were thought to have saved lives in the most public of events. A different question would be presented if Plaintiff had refused comment or spoken only as to the events witnessed. Taken as a whole, Plaintiff's actions instead reveal a well intentioned attempt, utilizing his newfound prominence, to effect damage control of the public's perceptions.

Finally, the Court must ascertain whether the alleged defamatory statements were germane to Plaintiff's participation in the controversy. To quote *Waldbaum*, "His talents, education, experience, and motives could have been relevant to the public's decision whether to listen to him. Misstatements wholly unrelated to the controversy, however, do not receive *New York Times* protection." *Waldbaum*, 627 F.2d at 1298. In the context of investigating a possible suspect, information regarding Plaintiff's background were pertinent to suspicions of his involvement in the bombing and cannot be considered wholly unrelated to the controversy. Once Plaintiff voluntarily entered a public controversy, he could expect scrutiny regarding his background and the possibility of misstatements which may attend the active interest of the media. Based on the preceding analysis, the Court finds Plaintiff to be a voluntary limited purpose public figure who must therefore meet the procedural burdens of that status.

Appendix B

Having concluded that Plaintiff is a voluntary limited purpose public figure, it is not necessary to extensively address the argument that Plaintiff may also be an involuntary limited purpose public figure. Applicable cases make clear however that even if Plaintiff's entry into the controversy was involuntary, "unless he rejects any role in the debate, he too has invited comment relating to the issue at hand." *Waldbaum*, 839 F.2d This case is also dissimilar from the recent case of *Wells v. Liddy*, 1999 WL 547916 (4th Cir. Md), in which the Court declined to find the Plaintiff an involuntary public figure because of her relatively minor role in any remaining controversy of Watergate. It is beyond argument that Plaintiff did not reject any role in the debate, was a prominent figure in the coverage of the controversy, and, whatever his reticence regarding his media appearances, encountered them voluntarily. "It is no answer to the assertion that one is a public figure to say, truthfully, that one doesn't choose to be. It is sufficient, . . . that [plaintiff] voluntarily engaged in a course that was bound to invite attention and comment." *Silvester*, 839 F.2d at 1496 quoting *Rosanova v. Playboy*, 580 F.2d at 861.

Plaintiff's Motion for Partial Summary Judgment is DENIED.

IT IS SO ORDERED this 5 day of October 1999.

s/ John R. Mather
The Honorable John R. Mather
Judge, State Court of Fulton County

APPENDIX C — ORDER OF THE SUPREME COURT OF THE STATE OF GEORGIA DENYING PETITION FOR REHEARING DATED FEBRUARY 11, 2002

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE
ATLANTA

DATE: February 11, 2002

L. Lin Wood Jr.
100 Peachtree Street, N.E.
The Equitable Building, Suite 2140
Atlanta, GA 30303

Case No. S02C0194

RICHARD JEWELL

v.

COX ENTERPRISES, INC., et al.,

COURT OF APPEALS CASE NO. A01A1565

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur, except Carley, J., who dissents.

Sherie M. Welch, Clerk

Supreme Court, U.S.
FILED
JUN 7 2002
OFFICE OF THE CLERK

No. 01-1627

In The

SUPREME COURT OF THE UNITED STATES

Richard Jewell,

Petitioner,

v.

Cox Enterprises, Inc., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Georgia

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an individual who gains prominence by choosing to make numerous appearances in prominent media outlets, and uses that prominence to speak out repeatedly on a public controversy, may be deemed a voluntary limited-purpose public figure in connection with that controversy.

2. Whether the Court's recognition of the involuntary public figure doctrine in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), has been overruled in subsequent cases in which the doctrine was neither raised by the litigants nor ruled upon by the Court.

CORPORATE DISCLOSURE STATEMENT

Respondent Cox Enterprises, Inc. is the sole corporate respondent in this case. Cox Enterprises, Inc. has no parent corporation and no publicly held company owns 10% or more of the stock of Cox Enterprises, Inc.

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Respondents, The Atlanta Journal-Constitution, its editors and its reporters (collectively, "The Journal-Constitution") respectfully submit this Brief in Opposition to the Petition for Writ of Certiorari of Richard Jewell.

STATEMENT OF THE CASE

Petitioner was one of the guards entrusted with security in Atlanta's Centennial Olympic Park, the centerpiece of the 1996 Summer Games. In this role, petitioner spotted a suspicious package containing a bomb that later exploded, killing two citizens and injuring many more.

The explosion reignited a public debate over Atlanta Olympic security, particularly Olympic Park security, that had preceded the Games. R. 289. Public concerns and anxiety had already mounted when, only two days before the Games began, TWA Flight 800 crashed off Long Island under circumstances that initially suggested a terrorist act. With the Park bombing, and the rash of bomb scares and evacuations that followed, *see* R. 284, 307, there was an intense search for understanding about what happened and whether it was likely to happened again.

Questions immediately arose as to whether the bombing was connected to domestic or international terrorism, R. 25,582-639, and whether event organizers had adopted adequate security measures, including the hiring and training of qualified security officers. R. 25,640-680. The adequacy of Olympic security's response to the blast was also questioned. Opinions were split -- had security personnel acted properly or had they been slow and uncoordinated in responding? R. 25,681-716. Questions also were raised as to why security forces in the Park only learned of the bomber's warning call to 911 after the explosion. *Id.* Finally, in the days immediately after the

blast, the safety of reopening Olympic Park and returning to the Games was vigorously debated. R. 25,717-763.

Because of his role in the bombing response, petitioner was interviewed by law enforcement agencies. R. 2,819-20. Members of the press also were interested in interviewing petitioner to see what light he could shed on the issues raised by the bombing. Petitioner had no obligation to speak with the press and was concerned that speaking publicly might harm the bombing investigation. R. 23,539. Despite these qualms, petitioner chose to spend much of the next three days engaged in a hectic schedule of appearances with prominent media outlets. Amid the heated debate over Olympic Park security, petitioner repeatedly went before the nation, providing his viewpoints on the bombing preparation and response and offering reassurances about public safety.

Petitioner's Post-Bombing Media Appearances

Petitioner's heroic "first responder" role was widely reported within hours after the bombing, and he gave so many media interviews in the next days that he no longer remembers them all. R. 25, 129-30. For example, petitioner does not recall that on the day of the bombing he gave an interview to the *Boston Globe*, which published at least two reports of the interview, the first on the day after the bombing. R. 494, 22,045-47.

Petitioner does recall that a spokesman for AT&T contacted him the day of the bombing with the information that one of the nation's preeminent news networks, CNN, was interested in an interview. AT&T did not employ petitioner and the company had no authority to arrange interviews on his behalf. Nonetheless, petitioner agreed to appear and drove to CNN headquarters where he was met by AT&T media specialist, Bryant Steele. R. 23,533-537. At

CNN, petitioner provided a fifteen-minute live interview, portions of which were later replayed repeatedly to a national audience. R. 23,540-541; Supp. R. 181, 183. Mr. Steele then told petitioner about other press inquiries and asked whether he would be interested in appearing for other interviews, including a follow-up appearance on CNN. R. 23,537-538.

Mr. Steele warned petitioner that giving interviews could be hectic, stressed that petitioner had no obligation to make appearances, and reminded petitioner that he could stop granting interviews at any time he chose. R. 23,537-538. Although concerned that talking to the press might harm the bombing investigation, petitioner authorized Mr. Steele to arrange media appearances on his behalf. R. 23,539. Later that day, petitioner phoned a reporter, whom he believes was from one of the nation's largest newspapers, the *Washington Post*, to give another interview. R. 24,961, 25,094-095.

On the day after the bombing, petitioner traveled to CNN for his follow-up appearance on the roof of the CNN building overlooking Olympic Park. Supp. R. 181, 183; R. 23,551-552. After approximately one hour at CNN, petitioner granted a telephone interview to a reporter whom he recalls as being from another major newspaper, the *Boston Globe*. R. 23,552-553, 24,963. Immediately afterward petitioner met with reporters from the nation's largest circulation newspaper, *USA Today*. To accommodate petitioner's busy schedule, *USA Today* journalists met petitioner in a parking lot across from CNN where he gave an interview that lasted between 15 minutes and one-half hour and then sat for a photo shoot. R. 23,554-555.

After his *USA Today* interview, petitioner moved on to *The Atlanta Journal-Constitution*, the largest circulation

newspaper in the Southeast. Once there, petitioner granted a one-hour interview, after which he posed for more photos. R. 23,561-562. Petitioner then gave another interview to a television news crew in which he discussed the subject of whether Olympic Park should re-open. R. 23,563. Finally, after briefly talking with journalists from yet another television station, petitioner went home. R. 23,565-566.

The next day, having already been contacted about a possible book deal, petitioner contacted an attorney friend to get advice on handling such opportunities. R. 25,123-124. Petitioner took a break from his hectic schedule later in the day, using free tickets provided by his AT&T driver to take in a baseball game with his mother. R. 25,073. Upon returning home from the game, petitioner returned a waiting telephone message from CNN and then fielded questions during a nationally-televised town meeting program dedicated to the bombing. R. 25,125-126.

The following morning, petitioner traveled to the official Olympic network, NBC, to appear as a guest on *Today*, one of the nation's most-watched morning news programs. Petitioner granted a live interview with Katie Couric in which he defended the response of law enforcement. R. 24,963-964. Immediately after his *Today* appearance, petitioner granted yet another interview to another journalist from NBC news. *Id.* Before leaving NBC petitioner stopped to grant another interview with a reporter whose name and organization he no longer remembers. *Id.* Later that day, in the first of a number of articles challenged by petitioner, The Journal-Constitution accurately reported that petitioner had become the focus of the bombing and accurately explained why he was suspected. R. 337.[1]

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[1] Petitioner's claims of falsity have not yet been tested by any court below and they cannot withstand scrutiny, particularly in light of the considerable factual record developed below as to the focus and basis of

Even the foregoing account of petitioner's media appearances is only partial. R. 25,129-130. Although petitioner cannot recall the exact number of his appearances, it is clear that petitioner became a prominent figure. Many millions of Americans heard and read petitioner's comments on the bombing, the bombing response, security preparedness and Olympic Park safety. These comments echoed throughout the nation and beyond as a myriad of other press organizations reported on petitioner and his views. *See, e.g.*, R. 21,859-988; Supp. R. 169-79.

Petitioner's Comments On The Controversy Over Olympic Park Safety

During his media appearances, petitioner weighed in repeatedly on the issues relating to Olympic Park safety that were then being debated publicly, including whether the planning for and response to the bombing had been adequate. For example, when asked in a CNN interview if his training had been adequate, petitioner offered reassurances, asserting that his training was indeed sufficient to prepare him for the bombing and touting his own previous six years of law enforcement experience. R. 21,867.

Petitioner also supported the adequacy of the response to the bombing:

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the FBI's investigation. For example, although petitioner claims that it was false to report that he had been matched to a law enforcement profile, Petition at 5, the Justice Department has confirmed that one of the reasons petitioner became the focus of its investigation was that profiling agents concluded that petitioner "fit the profile of a person who might create an incident so he could emerge as a hero." R. 22,424. Moreover, The Journal-Constitution's reports did not state or imply that petitioner was guilty or likely guilty of the bombing and did not convey any of the other implications upon which petitioner's claims are based.

> Jeanne Meserve: Do you feel you did all you could?
>
> Jewell: Yes Ma'am. The only thing I wish we could have done was got everybody out of the area. I feel for the victims and their families. I mean, this is the Olympics. This is supposed to be a time of joy for the world and it's a very, very bad thing and I just hope that we catch the people that did it, because I mean, we did everything we could . . . .

Id.

During his nationally-televised appearance on *Talk Back Live*, petitioner again reassured his audience as to the adequacy of the security force's training and response:

> All of the guards hired during the Olympics were given a training class when they were first hired. In that class, we were shown videos, and also instructed on searching bags and using metal detectors. Also, we were issued a book, which goes into more detail than the videos did. Also, my personal training, I am a law enforcement [officer] in Georgia; I'm just not employed right now. . . . I have six years of law enforcement experience here in Georgia. Everybody that was there, the law enforcement, the security guards, the park guards, the paramedics, the firemen, hundreds of citizens all came together at one time to do something that we never thought would happen and that we prayed wouldn't happen. But when it did, I was glad that everything worked out as well as it did.

R. 21,914.[2] Petitioner also supported the adequacy of the bombing response during an interviews in Olympic Park: "Everybody that was here acted so professionally and we did what we needed to do to try and save lives." Supp. R. 181.

By the time petitioner made his appearance with Katie Couric on the *Today* program, questions had arisen about a delay in getting word of the bomber's 911 call to people on the scene at Centennial Olympic Park. Prior to petitioner's live interview, Bryant Gumbel questioned Atlanta Police Chief Beverly Harvard on the subject: "Let's talk about the controversy swirling around your department's response to the tragedy the other night. Woody Johnson, the special agent in charge of Atlanta's FBI office, has said there was a delay in passing information of the threat on after the 911 call." R. 21,939. In his interview with Katie Couric, petitioner argued that the delay did not hinder the response:

> Jewell: [W]e were already reacting to the situation.
>
> Couric: Without the phone call?
>
> Jewell: Without any phone call. So even if the 911 call had gotten to us, we were already -- we were already ahead of it. We were already dealing with the problem. We already instigated a plan.

R. 21,954.

Petitioner also weighed in directly on the issue of whether it was safe to return to the Olympics and Centennial Olympic Park, speaking with a television crew conducting interviews on the issue of whether the Olympics should

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[2] *See also* R. 21,954 (petitioner's comment on *Today* that he "did the job that I was supposed to do" and "used my training the way I was taught").

continue and whether the park should reopen. *See* R. 23,563-564. Later, petitioner garnered audience applause during a nationally televised telephone interview when he offered encouragement to members of the public who had continued coming to the Games:

> Jewell: And I'd also like to take this opportunity, if I could, to thank the citizens of the world for continuing to come to all of the games and venues that they are to show this person or persons that this type of activity will not be tolerated in the world.
>
> Host: And that is the final word, Richard. Thank you so much for joining us. We really appreciate a lot of the support here for your statement from folks in the audience.

R. 21,914.

By choosing to offer his views in major news outlets, petitioner became a prominent figure in the public debate of the safety issues raised by the Olympic Park bombing. Appearing for interview after interview with some of the leading members of the national press in the days following the bombing, petitioner became a key figure, helping many millions of Americans to formulate views on the adequacy of law enforcement preparation, the appropriateness of the bombing response and the safety of returning to the park. As one judge observed, petitioner "became a media hero" in the immediate aftermath of the bombing. *See In re Four Search Warrants*, 945 F. Supp. 1563, 1564 (N.D. Ga. 1996).[3]

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[3] Ironically, petitioner's repeated television appearances were one of the factors that led investigators to conclude he "fit the profile of a person who might create an incident so he could emerge as a hero." R. 22,424.

Petitioner's Motion For Summary Judgment And The Rulings Below

Petitioner first raised the question of his public figure status when he filed a motion for partial summary judgment asking the trial court to decide the issue. After full briefing and a hearing, the trial court issued a detailed written opinion finding that petitioner had become a public figure by virtue of his voluntary participation in the controversy over Olympic Park safety. Looking at the entire record, including petitioner's many media appearances, the trial court found that petitioner had become a voluntary limited-purpose public figure by attempting to influence the controversy over Olympic Park safety. *See* Petition at 35a-40a.

The Georgia Court of Appeals agreed to exercise discretionary jurisdiction over the case and reviewed an array of questions, including the public figure issue. Following plenary briefing and full oral argument, a three-judge panel of the Georgia Court of Appeals unanimously affirmed the trial court's conclusion that petitioner had become a voluntary, limited-purpose public figure by the time The Journal-Constitution published the first of the statements challenged in this action. *See* Petition at 11a-22a. The Court of Appeals also issued an alternate ruling, emphasizing that even if petitioner were not already a voluntary public figure, he would still fall within the narrow class of involuntary public figures. *Id.* at 22a-24a.[4]

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[4] The Court of Appeals also overturned a trial court ruling ordering Journal-Constitution reporters to reveal confidential sources without first considering whether petitioner's libel claims could pass even the most basic tests of legal viability. The Court of Appeals remanded the case to the trial court for further proceedings, including proceedings to determine whether petitioner's claims are legally viable. *See* Petition at 2a-11a.

Because the Court of Appeals held that petitioner was a voluntary public figure or, in the alternative, an involuntary public figure, it did not

Petitioner next attempted to obtain certiorari review of the Court of Appeals' decision in the Georgia Supreme Court. On February 12, 2002, the Georgia Supreme Court unanimously denied certiorari.

I. Consistent With The Prior Decisions Of This Court, Both Of The Courts Below Found That Petitioner Became A Public Figure By Voluntarily Assuming A Position Of Influence In The Public Controversy Over Olympic Park Safety.

A. In Seeking Certiorari, Petitioner Repeatedly Misrepresents The Straightforward Ruling Of The Georgia Court Of Appeals.

The primary ruling of both the Georgia Court of Appeals and the trial court was that petitioner is a voluntary public figure for purposes of this litigation. Each of the courts below had no trouble reaching this conclusion based on a searching review of the record and a straightforward application of the principles first set forth by this Court in *Gertz* and subsequently adopted by the federal circuit courts.

The Georgia Court of Appeals, citing to *Gertz* as the "definitive case on how a private citizen becomes a public figure," Petition at 15a, followed the teaching of *Gertz* and its progeny by "looking to the nature and extent of [petitioner's] participation in the controversy" at issue. *Gertz*, 418 U.S. at 352; *see* Petition at 15a-22a.

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reach the question of whether petitioner also was a public official for First Amendment purposes. That status attaches to petitioner both because of his law enforcement role at the Olympics and because some of the challenged articles discussed his prior troubled career as a Georgia police officer.

First, the Court of Appeals verified the existence of the public controversy over Olympic Park safety in the aftermath of the bombing. *See* Petition at 16a-17a. Petitioner does not challenge the existence of this public controversy and did not challenge it below.

The court then looked closely at petitioner's role in the controversy prior to the publication of the statements he challenges. Reviewing all the facts -- such as petitioner's decision to accept the services of a media handler, his decision to make numerous appearances in prominent media outlets, and the specific content of his remarks during those interviews -- the court had no trouble affirming the trial court's conclusion that petitioner had become a voluntary public figure. Petition at 18a. *See generally id.* at 16a -22a.

Finally, the Georgia Court of Appeals looked at the statements challenged by petitioner and concluded that they were germane to the public controversy at issue. *See* Petition at 21a-22a. Petitioner also does not challenge this aspect of the ruling below.

Perhaps because an honest review of the Georgia Court of Appeals' decision confirms that it is sound and utterly consistent with this Court's prior precedent, petitioner repeatedly misrepresents the content of that decision. Thus, petitioner claims that certiorari is needed because the Georgia Court of Appeals allegedly held that every witness to newsworthy events is automatically transformed into a public figure if he speaks to any member of the press.[5] Indeed, petitioner even claims that the Court of Appeals held

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[5] *See* Petition at 27 ("Under the Court of Appeals' open-ended definition [of voluntary limited-purpose public figures], from the moment Petitioner spotted the package and helped evacuate park patrons from the vicinity of the blast, he was doomed to public figure status if he made any comments whatsoever about the event."). *See generally id.* at 28-29.

he was a voluntary limited-purpose public figure simply "because his acts were heroic and because the media sought him out for interviews to discuss the bombing." Petition at *i*.

These purported holdings not only are unsupported by the ruling of the Georgia Court of Appeals, the plain language of the court's opinion specifically forecloses them. For example, petitioner claims that the Georgia Court of Appeals held that "the fact that Petitioner 'voluntarily made media appearances' when he was 'under no obligation to do so' was sufficient to convert him into a voluntary limited-purpose public figure." Petition at 25.

Even cursory review of the decision below confirms that the Court of Appeals never held, or even suggested, that the mere act of making voluntary media appearances automatically converts a private citizen into a public figure.

Rather than resting its holding on the mere fact that petitioner spoke to the media -- as petitioner claims -- the Georgia Court of Appeals looked closely at the facts surrounding petitioner's many press appearances and the specific content of his public pronouncements in order to examine the "nature and extent" of his participation in the relevant controversy as required by *Gertz*. *See* Petition at 15a-22a. Based on this thorough review of the unique facts in this case, the Georgia Court of Appeals affirmed the trial court's conclusion that petitioner had become a public figure because he "voluntarily assumed a position of influence in the controversy [over Olympic park safety]." Petition at 18a.

Petitioner also claims that the Georgia Court of Appeals somehow deviated from this Court's prior precedent "by making it irrelevant whether Petitioner engaged in the voluntary conduct with the intent to advocate a particular

outcome to a public controversy." Petition at 26. Again, petitioner grossly misrepresents the ruling below.

The Court of Appeals, looking at the entire record, specifically found that petitioner used his media appearances to advocate a particular outcome in the controversy over park safety -- namely the vindication of law enforcement.[6] Petition at 20a ("Viewed objectively, Jewell's numerous media appearances in the days following the bombing reveal that he attempted to improve the public's perception of security at the park."). The trial court reached the same conclusion. Petition at 39a ("[H]is intention, viewed objectively, was to improve the public's perception of security at the Olympic Park in the presumed hope of influencing the controversy.").

Finally, petitioner claims the decision below somehow "establishes the legal principle that factual eyewitnesses to a newsworthy event are always converted into voluntary public figures if they agree to media interviews to discuss the facts of the event." Petition at 8.[7] Petitioner's portrayal of

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[6] Petitioner claims that the decision below conflicts with this Court's decision in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), because that case held that giving several press interviews regarding high-profile divorce proceedings was insufficient to convert one of the parties to the divorce into a public figure. Petition at 24. However, *Firestone* did not suggest that making press appearances can never lead to public figure status. Rather *Firestone* held that the plaintiff had not become a public figure because a private divorce does not qualify as a public controversy. 424 U.S. at 454. The Court also noted that it also was unreasonable to believe that press statements would be able to influence "the merits of the legal dispute . . . or the outcome of [the] trial." *Id.* at 454 n.3. The same cannot be said for the controversy at issue in this case, which, like many public controversies, was played out in the court of public opinion.

[7] *See also id.* at 27 ("Under the Georgia Court of Appeals definition of a voluntary limited-purpose public figure, there is no distinction between speech intended to inform and speech intended to advocate.").

the Court of Appeals decision again contradicts the opinion's clear language. The Georgia Court of Appeals specifically emphasized that its ruling was based on a finding that petitioner did *not* act as a mere factual witness during his media appearances. *See* Petition at 18a ("While Jewell asserts that his media role was limited to that of an eyewitness and that he did not attempt to shape the resolution of any controversy, Jewell's participation in interviews and the information he related about the controversy was not so circumscribed."). The trial court had reached the same conclusion. *See* Petition at 40a ("A different question would be presented if Plaintiff had refused comment or spoken only as to the events witnessed. Taken as a whole, Plaintiff's actions instead reveal a well intentioned attempt, utilizing his newfound prominence, to effect damage control in the public's perceptions.").

Among the reasons that the Georgia Court of Appeals did not make the holdings that petitioner attempts to ascribe to it is that the factual record before the court simply did not present the issue that petitioner claims was ruled upon. The Court of Appeals did not rule that every individual who provides an eyewitness account of a newsworthy event to the press automatically becomes a public figure because the unique facts before it presented a different question.

Both courts below looked at the record and found petitioner was not a run-of-the-mill witness who happened to provide the press with a factual account. Both the Court of Appeals and the trial court emphasized that petitioner first chose a course of conduct that elevated him to a place of unusual prominence and then used that prominence in an effort to influence issues being debated in the public controversy over Olympic Park safety.

B. The Test Applied By The Court Of Appeals Was Not Only Entirely Consistent With This Court's Prior Precedent, It Was The Test That Petitioner Himself Advocated Below.

Petitioner also claims that certiorari is needed because the Court of Appeals erred by following what he calls the "open-ended" public figure test first set forth twenty years ago in *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980) and adopted by the Eleventh Circuit fourteen years ago in *Silvester v. American Broadcasting Cos.*, 839 F.2d 1491 (11th Cir. 1988). Petition at 25.

As a preliminary matter, it must be noted that petitioner himself relied on these decisions as his principal authorities when he first asked the trial court to rule on the public figure question. Now petitioner suggests that certiorari is necessary so that he can attack as too "open-ended" the very precedent he relied upon below.[8] Aside from the impropriety of this request, certiorari is not merited both because the test applied by the Court of Appeals was correct and because petitioner is also a public figure under the new test he now points to as the only valid statement of the public figure standard.

In the trial court, petitioner correctly set forth the analysis of *Waldbaum* and *Silvester* by stating that to become a voluntary, limited-purpose public figure: "[T]he plaintiff either (1) must 'purposefully [try] to influence the outcome' of the public controversy, or (2) 'could realistically have been expected, because of his position in the controversy, to

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[8] Petitioner also seeks to call the decision below into question by stating that the court relied only on "selective language" from these cases. Petition at 25. This statement is misleading at best, since the "selective language" the court relied upon expresses the core holdings of the cases.

have an impact on its resolution.'" R. 24,973-74 (quoting *Silvester*, 839 F.2d at 1494).

Petitioner now attacks this analysis, asserting that a proper, "restrictive," test would hold a plaintiff is only a public figure if evidence shows both that he voluntarily assumed a place of influence in a public controversy, and that he concedes he did so with the subjective intention of influencing the controversy. *E.g.*, Petition at 24.

As a threshold matter, it should again be emphasized that the trial court and the Court of Appeals both found petitioner voluntarily assumed a prominent place in the debate over Olympic Park safety and that he attempted to use his position to influence the resolution of that debate.[9] It therefore is clear that petitioner is a voluntary limited-purpose public figure no matter what test is applied. Whether one looks to the test that petitioner relied upon previously or whether one looks to the "restrictive" test that he now claims is the only valid statement of the law, the findings of both courts below require that petitioner must be deemed a public figure. Seen in this light, it is clear that the current Petition is nothing more than an attempt to have this Court conduct yet another review of the record in hopes that it will ignore the evidence relied upon by both courts below.

Moreover, the test applied by the Georgia Court of

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[9] *See* Petition at 18a ("Jewell's actions show that he voluntarily assumed a position of influence in the controversy [over Park security]."); *id.* at 20a ("Viewed objectively, Jewell's numerous media appearances in the days following the bombing reveal that he attempted to improve the public's perception of security at the park."); *id.* at 39a ("[Plaintiff's] intention, viewed objectively was to improve the public's perception of security at the Olympic Park in the presumed hope of influencing the resolution of this public controversy.").

Appeals is entirely consistent with this Court's prior rulings. The Court's ruling in *Gertz* recognized two fundamental criteria that distinguish voluntary public figures from private figures. First, *Gertz* recognized that public figures usually have "greater access to the channels of effective communication [than private figures] and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." 418 U.S. at 344.

Petitioner easily meets this criterion. Petitioner met with so many members of the national and local press, and the number of interviews he granted was so great, he still cannot remember them all. R. 25,129-130. As the Court of Appeals noted, petitioner "was prominent enough to require the assistance of a media handler to field press inquiries and coordinate his media appearances." Petition at 19a.[10]

Under *Gertz*'s second criterion, public figures "voluntarily expose[] themselves to increased risk of injury from defamatory falsehood concerning them" either by general fame or by taking a prominent position in a public controversy. 418 U.S. at 345. Again, petitioner satisfies this criterion. Both courts below looked at the record and found that petitioner used his media appearances to weigh in on

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[10] Petitioner used this access to defend his innocence in the pages of The Atlanta Journal-Constitution itself. *See* "'*Hero' denies planting bomb*," *The Atlanta Journal-Constitution*, July 31, 1996, R. 341. Nor did petitioner's access to channels of communications quickly wane. Long after the bombing, petitioner continued to make appearances in and contacts with the media, including: calling a press conference to proclaim his innocence and publicize his upcoming suit against The Journal-Constitution, making a televised appearance to testify before Congress about his treatment as a bombing suspect, providing an interview as the subject of a *60 Minutes* report, appearing on *Oprah* and *Larry King Live*, providing interviews as the subject of a *Vanity Fair* article entitled "The Ballad of Richard Jewell," shopping the rights to his life story around Hollywood, and appearing on *Saturday Night Live!* R. 21,850.

issues relating to Olympic Park safety. For these reasons the Georgia Court of Appeals had no trouble finding petitioner "voluntarily assumed a position of influence in the controversy [over Park safety]." Petition at 18a.

Although both the trial court and the Court of Appeals found petitioner's intent clear, *Gertz* did not reserve public figure status for those who set out with the specific intention of assuming a place of influence in a public controversy. Under *Gertz* an individual relinquishes his status as a private figure if he "voluntarily injects himself *or is drawn into* a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions." *Gertz*, 418 U.S. at 351 (emphasis added).

Petitioner strives to create the appearance of a conflict between *Waldbaum* and *Silvester* on the one hand, and *Gertz* on the other. However, these long-standing decisions, which petitioner relied on below, simply refined and added analytical guidance to *Gertz*'s fairly broad definition of public figures. One of the helpful elucidations provided by *Waldbaum* and *Silvester* is the recognition that the question of whether a plaintiff intentionally entered into a controversy in order to influence its outcome is not evaluated solely in light of the plaintiff's *post-hoc* litigation claims.

Under *Waldbaum* and *Silvester*, plaintiffs who engage in conduct that can reasonably be expected to gain them prominence and influence in a public controversy, and that does in fact gain them such prominence and influence, must be treated as having intended that result. *Waldbaum* and *Silvester* thus recognize that in order for an individual to become a public figure he "either must have been purposely trying to influence the outcome or could realistically have been expected, because of his position in the controversy, to

have an impact on its resolution." *Waldbaum*, 627 F.2d at 1297; *see also Silvester*, 839 F.2d at 1496.

It would defy logic to interpret *Gertz* as permitting a plaintiff who has voluntarily assumed a place of prominence and influence in a public controversy to avoid the status of a public figure simply by claiming that he did not subjectively intend to do so. As *Waldbaum* explains, a plaintiff's status must be examined from an objective viewpoint both because it allows individuals to choose their actions appropriately and because it preserves the protections the First Amendment provides to the press:

> This objective approach should enable both the press and the individual in question to assess the individual's status, in advance, against the same yardstick. . . . [L]ooking only to what the individual thought would charge the press with discovering and evaluating the inner beliefs and peculiarities of particular individuals and thus would deprive the media of the very "breathing space" that *New York Times* sought to create and protect. Resolving these questions based on what a reasonable person, looking at the entire situation, would conclude allows the press and the individual to evaluate public-figure status against a single, discoverable norm and from there to act as they see fit, understanding the consequences of their conduct under *New York Times*.

627 F.2d at 1293-94.

This statement is entirely consistent with the Court's holding in *Gertz*. Under *Gertz*, citizens who gain access to the press, and who use that access to speak out prominently on a public controversy, must be deemed public figures.

This is because in doing so they must be presumed to have "invite[d] attention and comment." *Gertz*, 418 U.S. at 345. As the Court emphasized in *Gertz*, "[e]ven if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that . . . public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." *Id.*[11]

This case provides an excellent example of the problem that *Gertz, Waldbaum* and *Silvester* guard against. In the trial court, petitioner attempted to avoid being held a public figure by submitting an affidavit stating that he did not intend to influence any public issue when he made his many media appearances. However, under the long-standing test that petitioner himself previously relied upon, and consistent with the rationale of *Gertz*, it is an individual's pre-litigation actions and not his own self-serving, *post-hoc*, litigation testimony that determines his public figure status.

Here, both the trial court and the Georgia Court of Appeals reviewed the entire factual record and properly concluded that petitioner voluntarily assumed a position of prominence in the controversy over Olympic Park safety in order to influence that controversy. *See, e.g.*, Petition at 18a ("Jewell's actions show that he voluntarily assumed a position of influence in the controversy [over Park security]."); *id.* at 20a ("Viewed objectively, Jewell's

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[11] In *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979), the Court also looked beyond the plaintiff's subjective intent, holding that the plaintiff was not a public figure because there was no evidence that his decision not to appear before a grand jury "was intended to have, *or did in fact have*, any effect on any issue of public concern. In short, we find no basis whatsoever for concluding that plaintiff relinquished, to any degree, his interest in the protection of his own name." *Id.* at 168 (emphasis added).

numerous media appearances in the days following the bombing reveal that he attempted to improve the public's perception of security at the park.").

II. The Decision Below Does Not Conflict With The Court's Decision In *Hutchinson* And In No Way Authorizes Libel Defendants To Convert Private Individuals Into Public Figures Unilaterally.

In his second argument, petitioner asserts that certiorari is needed because the decision below allegedly conflicts with this Court's ruling in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979). In fact, this case does not bear even a passing similarity to *Hutchinson*. In this regard, it is worth noting that petitioner assiduously avoids discussing the facts of *Hutchinson* and mentions the case only twice in his entire argument.

In *Hutchinson*, Senator William Proxmire issued a "Golden Fleece" award to several federal agencies as a means of censuring their funding of research by the plaintiff, Ronald Hutchinson. 443 U.S. at 114-116. The award was intended to publicize what Proxmire perceived as "the most egregious examples of wasteful governmental spending." *Id.* at 114. In publicly announcing the award, Proxmire disparaged the plaintiff's work and accused him of gouging the American taxpayers, who ultimately paid for the allegedly "worthless" research. *Id.* at 116.

Hutchinson sued Proxmire for defamation. Proxmire in turn argued that Hutchinson was a public figure for purposes of the "controversy" surrounding his research. This Court held that the plaintiff was not a public figure at the time Proxmire issued the Golden Fleece award because no controversy had existed over the plaintiff's research prior to the announcement of the award. *Id.* at 135-36.

In so ruling, the Court rejected the notion that a defendant may launch disparaging public attacks on a private individual, and then claim that those attacks themselves constitute the public controversy for which the plaintiff is a public figure. As the Court put it, "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Id.* at 135.

Here, The Journal-Constitution did not create the controversy for which petitioner became a public figure. The record shows, and both courts below found, that the controversy over Olympic Park safety existed prior to The Journal-Constitution's publication of the statements that petitioner claims defamed him. *See* Petition at 12a-14a.

Indeed, the media appearances in which petitioner spoke out on the Olympic Park safety controversy all occurred prior to publication of the first allegedly defamatory article. *See* Petition at 12a-14a; discussion *supra* at 2-5. Thus, petitioner's public figure status was full blown before any of the challenged articles were published. In short, this case bears no resemblance to *Hutchinson* and the decision below certainly is not in conflict with *Hutchinson*.

Nonetheless, petitioner attempts to manufacture a conflict by arguing repeatedly that it was "the media" and not he who made him a public figure. *E.g.*, Petition at 18. As a preliminary matter, The Journal-Constitution is not responsible for the actions of "the media." Any attempt by petitioner to shoehorn this case into the mold of *Hutchinson* must rely on a showing that The Journal-Constitution was specifically responsible for his ascension to public figure status. Of course, even petitioner has not made this claim.

An equally fundamental flaw in petitioner's argument is that its factual predicate is baseless. In essence, petitioner argues that he falls within *Hutchinson* because "the media" made him a public figure while he played an essentially passive role. Specifically, petitioner claims that the court below held he became a public figure merely "by agreeing to media requests to be an on-the-record source for first-hand information about the bombing." Petition at 19.

The Georgia Court of Appeals held no such thing. Petitioner initially gained attention due to his role in the bombing response. Petitioner then reacted to that attention by authorizing a media expert to arrange media appearances on his behalf and by making numerous appearances with prominent press outlets. The Court of Appeals did not hold that petitioner became a public figure merely because he agreed to be a source. The court held that petitioner became a public figure because he made enough media appearances to achieve a high degree of prominence, and then used that prominence to weigh in repeatedly on a public controversy.

Nor did petitioner act merely as an "eyewitness" source for information about the bombing, as he repeatedly claims. Both courts below made specific factual findings to the contrary. As demonstrated above, both courts reviewed the entire record, including videotapes of petitioner's televised appearances, and confirmed that he repeatedly weighed in on the public controversy over Olympic Park safety. *See* Petition at 12a-14a, 17a-20a, 29a-31a, 38a-40a.

The remainder of petitioner's argument consists of generalized claims that the Georgia Court of Appeals' voluntary public figure ruling should be "viewed with disfavor" because it supposedly will have a chilling effect on news sources and allegedly deprives petitioner of his First Amendment rights. *See* Petition at 19-22.

The first of these contentions, this is simply another reiteration of the baseless assertion that the Georgia Court of Appeals somehow ruled that all news sources automatically become public figures if they provide any factual account of an event to a member of the press. As discussed previously, the Court of Appeals specifically found that petitioner was *not* merely an on-the-record news source. He was an individual who gained unusual prominence through repeated media appearances with a variety of prominent media outlets, and who used those appearances to weigh in repeatedly on an important public controversy. *See* discussion *supra* at 2-8.

As to petitioner's contention that the decision below somehow violates his First Amendment rights, his complaint lies not with the court below, but with this Court's entire First Amendment jurisprudence. Petitioner's basic thesis is that because his public figure status accrued to him as a result of his decision to speak in the press, and because that status makes it harder for him to collect damages in a lawsuit, his free speech rights have been violated.

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Court emphasized that decisions on how far the law of defamation may encroach on free speech must be made "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id.* at 270. *Gertz* struck the balance with respect to voluntary public figures, holding that individuals who ascend to positions of influence in public controversies "invite attention and comment" and thereby expose themselves to increased risk of injury arising from commentary germane to their role in such controversies. *See* 418 U.S. at 345. Of course, the most common way that individuals gain prominence in

public controversies is by airing their views in the press. Consequently, *Gertz* recognizes that public figures generally "enjoy significantly greater access to the channels of effective communication . . . than private individuals." *Id.* at 344.

The Court thus has established a framework providing clear notice to citizens, like petitioner, who contemplate going before the public to speak out: when one becomes involved in a matter of public controversy, one must accept the corresponding right of the press to the broadest protections of the First Amendment when reporting on matters germane to that controversy. *Id.* at 342-45.

In short, petitioner enjoyed no First Amendment right to both rise to a place of influence in a public controversy through his repeated media appearances, and simultaneously claim the status and rights of a private individual. Nor is his speech chilled because his actions are met with the constitutional consequences prescribed by this Court's rulings in *New York Times* and *Gertz*.

III. This Court's Decision In *Gertz* Specifically Recognized The Category Of Involuntary Public Figures, The Court Has Not Overruled That Decision, And No Conflict Exists Among Federal Appellate Courts Over The Validity Of The Involuntary Public Figure Doctrine.

In addition to finding that petitioner was a voluntary limited-purpose public figure by virtue of his decision to speak out repeatedly on matters pertaining to a public controversy, the court below also offered an alternative, secondary holding. Specifically, the Georgia Court of Appeals held that even if petitioner were not already a

voluntary public figure, he still would qualify as an involuntary public figure. *See* Petition at 22a-24a.

Petitioner claims that certiorari is necessary because this alternative ruling allegedly conflicts with decisions of this Court that have "refused to recognize the existence of the category of involuntary public figures." Petition at 11. Petitioner faces two primary obstacles in making this argument. The first is that the Court's seminal public figure case specifically recognized the category of involuntary public figures. *See Gertz*, 418 U.S. at 345. The second is that none of the subsequent cases that petitioner cites to as overruling *Gertz* even involved a claim of involuntary public figure status, much less contained a ruling on the issue.

Plaintiff begins by asserting that *Gertz* recognized only two kinds of public figures: voluntary all-purpose public figures, and voluntary limited-purpose public figures. Petition at 12. To the contrary, *Gertz* also recognized a third category of public figures when it stated that although "instances of truly involuntary public figures must be exceedingly rare," the potential exists for "someone to become a public figure through no purposeful action of his own." 418 U.S. at 345. The Court then stated that "[f]or the most part" those who attain public figure status fall within the two classes of voluntary public figures. *Id.*

Petitioner goes on to suggest that this Court has rejected the involuntary public figure category because its post-*Gertz* decisions "make no reference to the category of an involuntary public figure." Petition at 12. This should come as no surprise because the question of involuntary public figure status was never raised in those cases.

It also was unnecessary for the Court to discuss the involuntary public figure doctrine in those cases because the

Court found the plaintiffs could not be public figures *of any kind* since they had not occupied prominent positions in public controversies. *See Firestone*, 424 U.S. at 454-55 (plaintiff's private divorce did not constitute a public controversy and she therefore "assumed no 'special prominence in the resolution of public questions'") (quoting *Gertz*, 418 U.S. at 351); *Wolston*, 443 U.S. at 167 (plaintiff was not a public figure because the plaintiff "played only a minor role in whatever public controversy there may have been"); *Hutchinson*, 443 U.S. at 135 ("Hutchinson at no time assumed any role of public prominence in the broad question of concern about expenditures.").

As a fallback position, plaintiff argues that federal appellate courts are supposedly "clearly in conflict" over the validity of the involuntary public figure doctrine. Petition at 17 n.16. Petitioner offers an extensive string cite of cases in which federal circuit courts allegedly have "implicitly rejected" or "failed to expressly recognize" the involuntary public figure category. *Id.* Once more, petitioner relies on cases in which the involuntary public figure doctrine was never even raised. *See id.* Moreover, one decision has been vacated, another raised only the issue of the plaintiff's public *official* status, and another decision involved a plaintiff who simply conceded her public figure status.[12]

It is not surprising that these federal circuit courts have not "expressly recognized" the involuntary public figure doctrine in cases where the issue was not litigated. Similarly, the failure to discuss the involuntary public figure

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[12] *See Bichler v. Union Bank and Trust Co.*, 715 F.2d 1059, 1064-65 (6th Cir.), *vacated*, 718 F.2d 802 (6th Cir. 1983); *Garcia v. Board of Educ. of Socorro Consol. School Dist.*, 777 F.2d 1403, 1407-11 (10th Cir. 1985), *cert. denied*, 479 U.S. 814 (1986); *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1190 (9th Cir.), *cert. denied*, 493 U.S. 812 (1989).

issue in cases where the parties have not raised it does not constitute a rejection of the doctrine, implicit or otherwise.[13]

In fact, petitioner has identified only two federal appeals cases where the involuntary public figure doctrine actually was ruled upon. *See Wells v. Liddy*, 186 F.3d 505 (4th Cir. 1999), *cert. denied*, 528 U.S. 1118 (2000); *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736 (D.C. Cir.), *cert. denied*, 476 U.S. 1141 (1985).[14] Both of those cases relied upon *Gertz* in recognizing the category of involuntary public figures. *See Wells*, 186 F.3d at 532; *Dameron*, 779 F.2d at 741-43.[15]

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[13] Petitioner also claims that two federal trial courts and three state courts have held that the involuntary public figure classification "does not exist." Petition at 13 n.11. Again, petitioner relies on cases where the involuntary public figure issue was neither raised nor ruled upon. For example, the trial court decision in *Barry v. Time, Inc.*, 584 F. Supp. 1110 (N.D. Cal. 1984), specifically emphasized that it had not even been alleged that the plaintiff in that case was an involuntary figure. *Id.* at 1115 n.6. The decision in *Franklin v. Benevolent and Protective Order of Elks*, 97 Cal. App. 3d 915 (1979), contains no suggestion that the involuntary public figure doctrine ever was raised in that case. Likewise, the doctrine was not at issue in either *Jones v. Palmer Communications, Inc.* 440 N.W.2d 884 (Iowa 1989) or *Burgess v. Reformer Pub. Corp.*, 508 A.2d 1359 (Vt. 1986). The court in *Jones* did note, however, that "The Supreme Court has recognized certain types of public figures, including the all purpose public figure, the limited purpose public figure, *and the involuntary public figure*." 440 N.W.2d at 895 (emphasis added).

[14] Petitioner also asserts that the doctrine was adopted in *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976). However, in that decision the court simply noted that "plaintiffs admit that they are both public figures" and the opinion does not even mention the involuntary public figure doctrine. *Id.* at 209-10.

[15] Although the *Wells* case offers a different analysis than *Dameron*, petitioner would qualify under that analysis as well because he became a central figure in a "significant public controversy" and "assumed the risk of publicity" through his press forays. *See Wells*, 186 F.3d at 539-40.

The Georgia Court of Appeals' reliance on *Dameron*'s analysis for identifying involuntary public figures also does not constitute a return to *Rosenbloom*, as plaintiff suggests. *See* Petition at 15. The plurality in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), purported to extend the *New York Times* actual malice rule to all statements relating to any involvement by an individual in any "event of public or general concern." *Id.* at 52. *Dameron*, on the other hand, requires more than just some involvement in an event of "general concern." *Dameron* requires the existence of a bonafide public controversy and further requires that the plaintiff must have achieved a position of "special prominence" in the resolution of that public controversy without any volition. 779 F.2d at 742 (citing *Gertz*, 418 U.S. at 351).

Plaintiff finally argues that the *Dameron* test is too broad because under it an individual may become an involuntary public figure through "sheer bad luck," while bad luck "is relatively common." Petition at 15 n.14 (*citing Wells*, 186 F.3d at 539). Bad luck may be common, but the degree of bad luck necessary for an individual to end up in a place of special influence as a central figure[16] in a true public controversy *involuntarily* is, as *Gertz* recognizes, "exceedingly rare." 418 U.S. at 345. Petitioner has identified only two cases where courts have found involuntary public figures under the *Dameron* analysis --

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[16] Given the high bar set by the *Dameron* test, petitioner's claim that every person "involved in or associated with" the September 11 terrorist attacks would qualify as an involuntary public figure under the decision below is empty hyperbole. *See* Petition at 16 n.15. First, a legitimate public controversy would have to be identified, and then a private individual would have had to become a central figure in the resolution of that controversy without any volition.

Dameron and the present case.[17] There can be no question that the doctrine has remained as narrowly drawn and strictly applied as *Gertz* initially intended.

CONCLUSION

For all the foregoing reasons, respondents respectfully request that the petition be denied.

Respectfully submitted,

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[17] In this regard, it is worth noting that the court below first held petitioner to be a *voluntary* public figure. Only then did the court go on to state that "even if" plaintiff were not a voluntary public figure, "at the very least" he would still be an involuntary public figure. Petition at 22a.